

26
No. 94-1837-CFX
Status: GRANTED

Title: Barnett Bank of Marion County, N.A., Petitioner
v.
Bill Nelson, Florida Insurance Commissioner, et al.

Docketed:
May 8, 1995

Court: United States Court of Appeals for
the Eleventh Circuit

Counsel for petitioner: Lewin, Nathan

Counsel for respondent: Busch, David J., Kappler, Ann M.

Entry	Date	Note	Proceedings and Orders
1	May 8 1995	G	Petition for writ of certiorari filed.
3	May 25 1995		Order extending time to file response to petition until July 7, 1995.
4	May 25 1995		This extension is granted for all respondents.
9	Jul 5 1995		Brief of respondents Tom Gallagher, Insurance Commissioner, et al. in opposition filed.
5	Jul 7 1995		Brief amici curiae of American Bankers Association, et al. filed.
6	Jul 7 1995		Brief of respondents Florida Association of Life Underwriters, et al. in opposition filed.
7	Jul 7 1995		Brief amici curiae of United States, et al. filed.
8	Jul 7 1995	G	Motion of Consumer Bankers Association, et al. for leave to file a brief as amici curiae filed.
11	Jul 7 1995		Brief amicus curiae of New York Clearing House Association filed.
10	Jul 12 1995		DISTRIBUTED. September 26, 1995 (Page 40)
12	Jul 25 1995	X	Reply brief of petitioner filed.
13	Sep 27 1995		Motion of Consumer Bankers Association, et al. for leave to file a brief as amici curiae GRANTED.
14	Sep 27 1995		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. Rule 29.2 does not apply.
15	Nov 1 1995		***** SET FOR ARGUMENT TUESDAY, JANUARY 16, 1996. (1ST CASE).
16	Nov 1 1995		Record filed.
		*	Record proceedings U.S. Court of Appeals, Eleventh Circuit and U.S. District Court, M. Dist. Florida (2 BOXES)
17	Nov 8 1995		Brief amicus curiae of Florida Bankers Association filed.
18	Nov 9 1995		Joint appendix filed.
19	Nov 9 1995		Brief of petitioner Barnett Bank of Marion County, N.A. filed.
20	Nov 9 1995		Brief amici curiae of Consumer Bankers Association, et al. filed.
21	Nov 9 1995		Brief amici curiae of United States and the Comptroller of the Currency filed.

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Entry	Date	Note	Proceedings and Orders
22	Nov 9 1995	Brief amici curiae of American Deposit Corp., et al. filed.	
23	Nov 9 1995	Brief amici curiae of American Bankers Association, et al. filed.	
24	Nov 9 1995	Brief amicus curiae of New York Clearing House Association filed.	
25	Nov 9 1995	CIRCULATED.	
26	Nov 16 1995	G Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.	
27	Nov 21 1995	Letter from the Solicitor General received and distributed.	
28	Dec 4 1995	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.	
29	Dec 7 1995	X Brief amici curiae of National Conference of State Legislatures, et al. filed.	
38	Dec 7 1995	X Brief amicus curiae of National Association of Insurance Commissioners filed.	
30	Dec 8 1995	X Brief of respondents Florida Association of Life Underwriters, et al. filed.	
31	Dec 8 1995	X Brief of respondents Bill Nelson and Florida Department of Insurance filed.	
32	Dec 8 1995	LODGING consisting of sixteen copies of a bound volume submitted by counsel for respondents Bill Nelson, et al.	
33	Dec 8 1995	X Brief amici curiae of Don Stephens, Commr. of Kentucky Dept. of Insurance, et al. filed.	
34	Dec 8 1995	LODGING consisting of nine copies of a single bound vol submitted by counsel for amici Don Stephens, et al.	
35	Dec 8 1995	X Brief amicus curiae of American Council of Life Insurance filed.	
36	Dec 8 1995	X Brief amicus curiae of Council of Insurance Agents and Brokers filed.	
37	Dec 13 1995	G Motion of respondents for divided argument filed.	
39	Dec 20 1995	Motion of respondents for divided argument GRANTED.	
40	Dec 28 1995	X Reply brief of petitioner Barnett Bank of Marion County, N.A. filed.	
41	Jan 16 1996	ARGUED.	

No. 94-

941837 MAY 8 1995

IN THE OFFICE OF THE CLERK
Supreme Court of the United States
OCTOBER TERM, 1994

BARNETT BANK OF MARION COUNTY, N. A.,

Petitioner,

v.

TOM GALLAGHER, INSURANCE COMMISSIONER OF
THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF INSURANCE,
FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC.,
AND FLORIDA ASSOCIATION OF INSURANCE AGENTS,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

RICHARD E. SWARTLEY
General Counsel
BARNETT BANKS, INC.
50 N. Laura Street
Jacksonville, FL 32202
(904) 791-7505

NATHAN LEWIN
(*Counsel of Record*)
SCOTT L. NELSON
JAMES R. HEAVNER, JR.
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner

(i)

QUESTIONS PRESENTED

1. Whether a federal statute that gives a national bank operating in a town with a population not exceeding 5,000 the right to sell insurance (12 U.S.C. § 92) preempts a state law that prohibits such a bank from selling insurance.
2. Whether a state law prohibiting banks from selling insurance is a law enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).
3. Whether 12 U.S.C. § 92 is an "Act [that] specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

(ii)

LIST OF PARTIES

The names of all parties to the proceeding below appear in the caption of this case.

The petitioner Barnett Bank of Marion County, N.A., is a wholly owned subsidiary of a bank holding company, Barnett Banks, Inc. The petitioner has a subsidiary, Barnett Investment Properties, Inc., which is a bank service corporation that petitioner owns jointly with other Florida-based banking subsidiaries of Barnett Banks, Inc. The parent, Barnett Banks, Inc., has a direct ownership interest in two non-wholly owned subsidiaries: Barnett Bank of Lake Okeechobee (a state bank) and Southeast Switch, Inc. (a regional ATM/EFT network). In addition, Barnett Banks, Inc., through a wholly owned subsidiary, indirectly holds a fifty percent ownership interest in Main America Capital, L.C., a joint venture with MAC Partners.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

TOM GALLAGHER, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, FLORIDA
DEPARTMENT OF INSURANCE, FLORIDA
ASSOCIATION OF LIFE UNDERWRITERS,
PROFESSIONAL INSURANCE AGENTS OF
FLORIDA, INC., and FLORIDA
ASSOCIATION OF INSURANCE AGENTS,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Barnett Bank of Marion County, N.A., respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 43 F.3d 631 (11th Cir. 1995), and is reproduced at Pet. App. A, *infra*, 1a-16a. The opinion of the United States District Court for the Middle District of Florida (Pet. App. B, *infra*, 17a-36a) is reported at 839 F. Supp. 835. The Court of Appeals' order denying a timely petition for rehearing (Pet. App. C, *infra*, 37a-38a) is unreported. The opinion of the Court of Appeals for the Sixth Circuit that conflicts with the decision in this case (Pet. App. D, *infra*, 39a-64a) is reported at 44 F.3d 388.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on January 30, 1995. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 28, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Supremacy Clause of the United States Constitution (art. VI, cl. 2) provides in pertinent part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land

....

2. 12 U.S.C. § 92, 39 Stat. 753, provides:

In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided, however,* That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

3. The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), 59 Stat. 34, provides in pertinent part:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which

imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance

4. Florida Statutes Annotated § 626.988 provides in pertinent part:

626.988. Financial institutions; agents and solicitors prohibited from employment; exceptions

(1) For the purpose of this section, the following definitions shall apply:

(a) "Financial institution" means any bank, bank holding company, savings and loan association, savings and loan association holding company, or savings and loan association service corporation or any subsidiary, affiliate, or foundation of any of the foregoing. This definition shall not, however include any financial institution which has been granted an exemption by the Board of Governors of the Federal Reserve System pursuant to s. 4(d) of the federal Bank Holding Company Act of 1956, as amended,[] or any financial institution which neither owns more than 10 percent of the capital stock, nor exercises effective control, of a bank, savings and loan association, or entity licensed under chapter 494 and licensed or authorized to transact business in this state. Specifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city

having a population of less than 5,000 according to the last preceding census.

(b) "Insurance agency activities" means the procurement of applications for, or the solicitation, negotiation, selling, effectuating, or servicing of, any policy or contract of insurance other than credit life insurance and credit disability insurance.

* * *

(2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

STATEMENT

In *United States Nat'l Bank of Oregon v. Independent Ins. Agents, Inc.*, 113 S. Ct. 2173 (1993), this Court unanimously held that 12 U.S.C. § 92, enacted in 1916, "remains in force" (113 S. Ct. at 2187) notwithstanding its omission from recent editions of the United States Code. Section 92 states that national banks in small communities (those with populations of 5,000 or less) "may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company."

At least fifteen States¹ have laws purporting to restrict the ability of national banks to sell insurance within the State's borders to the full extent permitted under Section 92.² The Eleventh Circuit's decision in this case upholds such a law on the ground that the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1012(b), insulates the local law against a federal preemption challenge. The Sixth Circuit, on the other hand, has very recently held that a similar Kentucky law is preempted by the federal statute and may not be enforced to prevent national banks in small communities in Kentucky from selling insurance. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) (reproduced as Pet. App. D, *infra*, 39a-64a).

The Comptroller of the Currency has actively supported the authority of national banks in small towns to

¹ See Conn. Gen. Stat. Ann. § 38a-755 (West 1992 & Supp. 1994); Fla. Stat. Ann. § 626.988(2) (West 1984 & Supp. 1995); Ky. Rev. Stat. Ann. § 287.030 (Michie 1988); La. Rev. Stat. Ann. § 6:121B(2) (West 1954 & Supp. 1995); Me. Rev. Stat. Ann. tit. 24-A, § 1514-A (West 1990 & Supp. 1994); Mass. Ann. Laws ch. 175, § 174E (Law. Co-op. 1987 & Supp. 1995); Nev. Rev. Stat. Ann. § 683A.110 (Michie 1992 & Supp. 1993); N.H. Rev. Stat. Ann. § 384:16-b(II) (1983); N.J. Stat. Ann. § 17:3C-1 (West 1993); Pa. Stat. Ann. tit. 40, § 281(b) (1992); R.I. Gen. Laws §§ 27-3-46, 27-3-47 (1994); Tenn. Code Ann. § 56-6-201 (1994); Tex. Ins. Code Ann. art. 21.07-3 § 5(h) (West 1993); Vt. Stat. Ann. tit. 8, § 4811 (1993); W. Va. Code § 31A-8C-1, 31A-8C-2(f) (1994).

² Several other States apparently acknowledge the effect of Section 92 and exempt from a general prohibition any banks in municipalities of 5,000 or less population. See, e.g., Ark. Code Ann. § 23-64-203 (Michie 1994); Colo. Rev. Stat. § 10-2-221(2) (1994); Ga. Code Ann. § 33-3-23(b) (1992); N.M. Stat. Ann. § 59A-12-10 (Michie 1978 & Supp. 1994). See also, Miss. Code Ann. § 83-17-229 (1972) (permitting insurance sales by lending institutions located in communities with populations of 7,000 or less).

sell insurance pursuant to 12 U.S.C. § 92. The Comptroller intervened in the *Owensboro* case and participated as a plaintiff in the District Court and as an appellee in the Court of Appeals. The Comptroller also participated in this case by submitting declarations to the District Court in support of the Bank's position and by filing a brief in the Eleventh Circuit as *amicus curiae*, seeking reversal of the District Court's judgment.

We seek a writ of certiorari to resolve the conflict between the Eleventh and the Sixth Circuits and clarify the application of federal law to local laws that limit national banks' activity in the sale of insurance. There are at least twelve States outside the Sixth and Eleventh Circuits in which the validity of such local laws are still undetermined, and if the issue remains unresolved similar laws might, in the future, be enacted in other States.

1. Factual Background

Petitioner Barnett Bank of Marion County ("Barnett Bank" or "the Bank") is a national bank doing business in the State of Florida. The Bank has a branch in Belleview, Florida, a town with a population of 2,666. In 1993, Barnett Bank purchased an insurance agency that had been owned by Ms. Linda Clifford, a licensed Florida insurance agent. Ms. Clifford became an employee of Barnett Bank, with an office located in Belleview. Four days later, the Florida Department of Insurance issued an order pursuant to Fla. Stat. Ann. § 626.988 directing Ms. Clifford and her associates to cease all their insurance agency activities other than the selling of credit life and disability insurance (which the Florida statute permits).

2. District Court Proceedings

Simultaneously with its acquisition of Ms. Clifford's agency, Barnett Bank filed this action against the Insurance Commissioner of the State of Florida and the Florida Department of Insurance in the United States District Court for the Middle District of Florida, seeking a declaratory judgment that 12 U.S.C. § 92 preempted Fla. Stat. Ann. § 626.988, which otherwise would prohibit the Bank or any of its employees from acting as an insurance agent.³ The District Court had jurisdiction under 28 U.S.C. § 1331. When the Florida Department of Insurance issued its order requiring the Bank's insurance agency to cease operations, the Bank moved for a temporary restraining order and preliminary injunction. The District Court denied the TRO, and consolidated the motion for preliminary injunction with a trial on the merits of the Bank's claims for permanent declaratory and injunctive relief, as well as with the

³ The Florida statute prohibits financial institutions (including their affiliates and employees) from acting as insurance agents. Financial institutions are defined by the statute to include banks, bank holding companies, and their subsidiaries, affiliates and foundations. Fla. Stat. Ann. § 626.988(1)(a). The statute further provides that "[s]pecifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census." *Id.* As the District Court stated, this exclusion "[meets] federal section 92 halfway" in that it allows *some* banks — those that are not affiliated with bank holding companies — to operate insurance agencies in towns with populations less than 5,000. Pet. App. B., *infra*, 23a-24a. Barnett Bank, however, was forbidden by the terms of the Florida statute to operate an insurance agency, because it is a subsidiary of a bank holding company, Barnett Banks, Inc.

defendants' counterclaims for a declaratory judgment that the Florida statute was not preempted.⁴

After trial, the District Court denied the motion for a preliminary injunction, and issued a final judgment denying Barnett Bank's requests for permanent injunctive and declaratory relief. The court acknowledged that the Florida statute prohibiting the Bank from operating an insurance agency directly conflicted with 12 U.S.C. § 92. Nonetheless, the court held that the Florida law was saved from preemption by the McCarran-Ferguson Act, which provides that federal law shall not preempt state laws "regulating the business of insurance," unless the federal law in question "specifically relates to the business of insurance." According to the court, the Florida statute prohibiting banks from acting as insurance agents was a law "regulating the business of insurance," but the federal statute permitting banks to act as insurance agents was not a law "specifically relat[ing] to the business of insurance."

3. The Eleventh Circuit's Ruling

Barnett Bank appealed, and the Eleventh Circuit affirmed. Ignoring the contrary decision of the Sixth Circuit in *Owensboro*, the Eleventh Circuit accepted both parts of the District Court's analysis of the application of the McCarran-Ferguson Act. First, purporting to apply a test derived from this Court's decision in *United States Dep't. of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), the court concluded that the Florida statute "regulat[es] the business of insurance" within the meaning of the McCarran-Ferguson Act because the Florida law "was enacted to regulate the

⁴ By the time of trial, the state defendants had been joined by various associations of Florida insurance agents, who intervened as defendants and counter-claimants.

relationship between insurers and *potential* policyholders or, more broadly, 'the insurance-purchasing public at large.'" Pet. App. A, *infra*, 11a. The Eleventh Circuit also held that 12 U.S.C. § 92, the federal statute permitting small-town national bank branches to operate insurance agencies, does not "specifically relat[e] to the business of insurance." The court reasoned that in ~~permi~~tt~~ing~~ such banks to sell insurance, "Congress was concerned with banking, not insurance." Pet. App. A, *infra*, 15a.

REASONS FOR GRANTING THE WRIT

I

THERE IS A SQUARE CONFLICT OF CIRCUITS ON THE LEGAL ISSUES

This case presents issues on which federal courts of appeals are in direct conflict. The Eleventh Circuit's decision that the McCarran-Ferguson Act immunizes the Florida statute at issue from preemption by 12 U.S.C. § 92 is directly contrary to the result and the reasoning of the Sixth Circuit in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) (Pet. App. D, *infra*, 39a-64a).

Owensboro concerned a Kentucky statute that, like the Florida statute at issue here, bars certain banks doing business in Kentucky from acting as insurance agents (except with respect to credit life and credit health insurance and real property mortgage insurance). Several national banks with small-town branches had unsuccessfully applied to Kentucky's insurance commissioner for licenses to act as insurance agents. The banks sought declaratory and injunctive relief based on the claim that Section 92 preempted the Kentucky statute. The District Court granted

summary judgment for the plaintiff banks. *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 37 (E.D. Ky. 1992).

The Sixth Circuit affirmed the District Court's judgment. It held that Section 92 preempts the Kentucky statute (Pet. App. D, *infra*, 48a-49a), and specifically rejected the claim that the McCarran-Ferguson Act insulates a contrary state statute. The Sixth Circuit said that the McCarran-Ferguson Act was inapplicable because the state prohibition on banks acting as insurance agents was not "enacted . . . for the purpose of regulating the business of insurance." See Pet. App. D, *infra*, 49a.

The Sixth Circuit's decision that the Kentucky statute is not a law "regulating the business of insurance" conflicts with the reasoning of the Eleventh Circuit in this case. The Sixth Circuit noted that "[t]he 'business of insurance' is made up of 'practices' and 'activities' that satisfy the criteria set forth in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982)." Pet. App. D, *infra*, 46a. These criteria, the Sixth Circuit observed, are:

first, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and insured; and *third*, whether the practice is limited to entities within the insurance industry.

Id. at 46a-47a (quoting *Pireno*, 458 U.S. at 129).

Applying these criteria, the Sixth Circuit concluded that "[e]xcluding a person from participation in an activity, however, is different from regulating the manner in which that activity is conducted. The former is the regulation of

the person; the latter is the regulation of the activity." Pet. App. D, *infra*, 48a.⁵

The Eleventh Circuit, on the other hand, concluded that a prohibition against the sale of insurance by banks "was enacted to regulate the relationship between insurers and *potential* policyholders" and therefore came within the language of the McCarran-Ferguson Act. Pet. App. A, *infra*, 11a. That view of the McCarran-Ferguson language also conflicts with the opinion expressed by the Court of Appeals for the Third Circuit in *United Services Auto. Ass'n v. Muir*, 792 F.2d 356 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). That case held that a state law forbidding banks from selling insurance was not saved from preemption by the McCarran-Ferguson Act, because the state law "has no part in the business of insurance under McCarran-Ferguson." *Id.* at 364.

II

THE LEGAL PRINCIPLES ARE IMPORTANT AND SHOULD BE APPLIED UNIFORMLY ACROSS THE COUNTRY

The conflict between the Sixth and Eleventh Circuits has important consequences. As matters now stand, national banks with small-town branches in the four States of the Sixth Circuit (and, most likely, the three States of the Third Circuit) may operate insurance agencies through those branches, as permitted by federal law, without concern that

⁵ Once it concluded that the Kentucky statute did not regulate the business of insurance within the meaning of the McCarran-Ferguson Act, the Sixth Circuit did not reach the question whether 12 U.S.C. § 92 "specifically relates to the business of insurance." Pet. App. D, *infra*, 49a.

state regulators may shut them down under local statutes protecting the insurance agents' industry.⁶ National banks in Florida, Alabama and Georgia, by contrast, may not exercise their federally granted powers in this area if state law prohibits their sale of insurance.⁷

The conflict creates national uncertainty. Approximately a dozen States in other Circuits have laws in force that, on their face, conflict with 12 U.S.C. § 92. The validity of these laws will remain in question, and the freedom of national banks to engage in activities permitted by Section 92 will remain under a cloud of uncertainty, until this Court resolves the legal issues. Litigation in one of these States — Louisiana — has reached the appellate level, and the Supreme Court of Louisiana will soon be forced to choose sides in the conflict. *See First Advantage Ins., Inc. v. Green*, No. 94 CA 0813 (La. Ct. App. Mar. 3, 1995), *application for writ of certiorari or review pending*, No. 95-C-0820 (La. 1995). And the Eleventh Circuit's decision may well prompt other States to enact legislation limiting insurance agency activities by banks, thereby widening the field of conflict.

Resolution of this uncertainty is of great practical importance to banks and insurance agents. There has been extensive litigation in the past decade over the question whether banks may sell insurance, and this reflects the

⁶ Such statutes exist in Kentucky, Tennessee, Pennsylvania and New Jersey.

⁷ Of the three States in the Eleventh Circuit, only Florida currently has a statute that directly conflicts with 12 U.S.C. § 92. Under the Eleventh Circuit's ruling, however, the legislatures of Alabama and Georgia may impose such a restriction if they are persuaded to do so by competing interest groups.

significant economic consequences this issue has for the industries involved. See generally *Nations Bank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S.Ct. 810 (1995); *United States Nat'l Bank of Oregon v. Independent Ins. Agents, Inc.*, 113 S. Ct. 2173 (1993); *Variable Annuity Life Ins. Co. v. Clark*, 13 F.3d 833 (5th Cir. 1994); *Independent Ins. Agents of Am. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993); *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993); *Citicorp v. Board of Governors*, 936 F.2d 66 (2d Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992); *Independent Ins. Agents, Inc. v. Board of Governors*, 890 F.2d 1275 (2d Cir. 1989), *cert. denied*, 498 U.S. 810 (1990); *National Ass'n of Casualty & Surety Agents v. Board of Governors*, 856 F.2d 282 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989); *Independent Ins. Agents, Inc. v. Board of Governors*, 835 F.2d 1452 (D.C. Cir. 1987); *Independent Ins. Agents, Inc. v. Board of Governors*, 736 F.2d 468 (8th Cir. 1984); *First Nat'l Bank v. Smith*, 610 F.2d 1258 (5th Cir. 1980).

III

THE COMPTROLLER OF THE CURRENCY HAS ACTIVELY SUPPORTED THE PETITIONER'S POSITION IN FEDERAL LITIGATION

The importance of the legal issues is underscored by the active participation of the Executive Branch of the federal government in this case and in the *Owensboro* case. The Comptroller of the Currency, represented by the Civil Division of the Department of Justice, challenged the Kentucky and Florida laws at issue in these cases. Noting that the Comptroller of the Currency "has an obvious interest in assuring that national banks are able to exercise the powers granted to them by Congress," the United States

participated as *amicus curiae* in support of petitioner in the Eleventh Circuit in this case. Brief for the Comptroller of the Currency of the United States as *Amicus Curiae* at 2, *Barnett Bank of Marion County, N.A. v. Gallagher*, 43 F.3d 631 (11th Cir. 1995) (No. 93-3508). The Justice Department argued that the Florida statute was not enacted "for the purpose of regulating the business of insurance" within the meaning of McCarran-Ferguson because "the aim of the Florida statute is not to adjust, manage or control the insurance business, but to regulate the powers of financial institutions, including banks." *Id.* at 18. The United States further asserted that 12 U.S.C. § 92 "specifically relates" to the business of insurance under the McCarran Ferguson Act since it "describes — in indisputably specific terms — the insurance agency activities in which certain national banks may engage." *Id.* at 22.

In *Owensboro*, the United States intervened to support the plaintiff banks and, as it did in this case, voiced concern about the impact of the state law on the ability of national banks to conduct business activities specifically authorized by Congress. Arguing that Kentucky's statute was preempted by 12 U.S.C. § 92, the Department of Justice contended that

[i]t is simply unreasonable to conclude that the McCarran-Ferguson Act, which was primarily intended to restore to the states the "power to regulate or tax the business of insurance" . . . H.Rep. No. 143, 79th Cong., 1st Sess. 3 (1945) . . . has the effect of intruding upon the longstanding and traditional federal governance of national banks.

Brief of the Appellee United States at 29, *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) (Nos. 92-6330, 92-6331).

The United States' participation in the resolution of these legal issues by the Courts of Appeals manifests the important national interests at stake. Although the government did not formally intervene in this case, it made its position clear to both the District Court and the Eleventh Circuit.

IV

THE ELEVENTH CIRCUIT'S DECISION IS ERRONEOUS

Given the square Circuit conflict on the applicable legal issues, we will not here belabor the merits of the case. However, even a brief review of the Eleventh Circuit's decision shows it to be dubious. In holding that the Florida statute — which simply excludes certain banks from acting as insurance agents — is for the "purpose of regulating the business of insurance," the Eleventh Circuit adopted a particularly expansive view of both the "business of insurance" and of what it means to "regulate" that business. By contrast, it adopted an exceedingly narrow definition of both the "business of insurance" and what it means for a statute to "relate" to that business under the second prong of its preemption analysis under the McCarran-Ferguson Act, thereby arriving at the curious holding that a statute that specifically authorizes a national bank to sell insurance does not "relate" to the business of insurance.

The two halves of the Eleventh Circuit's analysis manifestly do not fit together. The category of statutes that "regulate" the business of insurance should, by any ordinary

standards of construction, be *narrower* than that of statutes that "relate" to that business. If a statute that says a bank may *not* sell insurance *regulates* the business of insurance, it necessarily follows that a statute that specifically says a bank *may* sell insurance specifically *relates* to the business of insurance. One of the two parts of the Eleventh Circuit's analysis must be wrong. And if either part is wrong, the Eleventh Circuit's conclusion that the Florida statute is not preempted cannot stand.

V

THIS CASE IS THE MORE APPROPRIATE VEHICLE FOR DECISION OF THE LEGAL ISSUES

Because the conflict between the Eleventh Circuit's decision below and the Sixth Circuit's *Owensboro* ruling is so direct, it is likely that this Court will receive petitions for writs of certiorari seeking review of both decisions. We respectfully suggest that this case is the appropriate one in which to address the issues.

First, this case presents the issue in a particularly concrete setting: Barnett Bank has purchased an insurance agency and employs a licensed agent ready to carry on the business as soon as Florida's statutory prohibition on that activity is declared preempted. The same cannot be said of the facts in Kentucky, where the litigation was initiated at a much less ripe state. *Second*, the Eleventh Circuit's decision addresses both halves of the McCarran-Ferguson Act analysis, and thus frames both issues for this Court's review. *Finally*, the decision of the Eleventh Circuit is incorrect and, unlike that of the Sixth Circuit, merits reversal by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN

(Counsel of Record)

SCOTT L. NELSON

JAMES R. HEAVNER, JR.

MILLER, CASSIDY,

LARROCA & LEWIN

2555 M Street, N.W.

Washington, D.C. 20037

(202) 293-6400

RICHARD E. SWARTLEY

General Counsel

BARNETT BANKS, INC.

50 N. Laura Street

Jacksonville, FL 32202

(904) 791-7505

May 1995

Attorneys for Petitioner

APPENDIX

1a

APPENDIX A
43 F.3d 631

**BARNETT BANK OF MARION COUNTY, N.A.,
a national banking association, Plaintiff-Counter-
Defendant, Appellant, Cross-Appellee,**

v.

**Tom GALLAGHER, Insurance Commissioner
of the State of Florida, Fla. Dept. Insurance, a
state agency, Defendants-Appellees, Cross-
Appellant,**

**Florida Association of Life Underwriters,
Professional Insurance Agents of Florida, Inc.,
Florida Associations of Insurance Agents,
Defendants-Counter-Claimant, Appellees-Cross-
Appellants.**

No. 93-3508

United States Court of Appeals,
Eleventh Circuit

Jan. 30, 1995.

David M. Wells, Peter E. Nicandri, Jacksonville, FL,
for appellant.

David J. Busch, Tallahassee, FL, Scott A. Sinder,
Ann M. Kappler, Arti K. Rai, Washington, DC, J. Robert
McClure, Jr., F. Townsend Hawkes, Tallahassee, FL, for
appellee.

Virginia B. Townes, Akerman, Senterfitt & Eidson, P.A., Orlando, FL, Anthony J. Steinmeyer, Jacob M. Lewis, U.S. Dept. of Justice, Civ. Div., Appellate Staff, Washington, DC, Daniel Y. Sumner, Florida Dept. of Ins., Tallahassee, FL, for amicus, Florida Bankers Ass'n.

Appeals from the United States District Court for the Middle District of Florida.

Before COX, Circuit Judge, FAY, Senior Circuit Judge, and CARNES*, District Judge.

FAY, Senior Circuit Judge:

This appeal arises from a final order following a bench trial on the merits of plaintiff Barnett Bank of Marion County's ("Barnett Marion") suit for permanent injunctive and declaratory relief against Florida Insurance Commissioner Tom Gallagher and the Florida Department of Insurance. The Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and the Florida Associations of Insurance Agents intervened in the district court. Appellant Barnett Marion alleges the district court erred in concluding that Fla. Stat. ch. 626.988 regulates insurance, and in concluding that 12 U.S.C. § 92

* Honorable Julie E. Carnes, U.S. District Judge for the Northern District of Georgia, sitting by designation.

("section 92") does not relate to insurance.¹ We disagree, and AFFIRM the district court judgment.

Appellee/Cross-Appellants Tom Gallagher and the Florida Department of Insurance allege the district court erred in holding section 92 permits national banks to sell insurance nationwide. Appellee/Cross-Appellants Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and the Florida Associations of Insurance Agents allege the district court erred in finding that Appellant Barnett Marion was "located and doing business in a place with a population of less than 5000" pursuant to section 92. Based on our reading of the Federal and Florida statutes, we find it unnecessary to reach either of these issues.

I. BACKGROUND

Florida law precludes bank subsidiaries or bank holding company affiliates from conducting insurance activities in Florida. Fla. Stat. ch. 626.988 (1993). Federal law, however, allows national banks—despite their status as subsidiaries or affiliates—to act as insurance agents in localities with fewer than five thousand people. 12 U.S.C. § 92 (1988).

¹ Recently the United States Supreme Court resolved a conflict among the Circuit Courts of Appeals by holding that section 92 properly is included in § 13 of the Federal Reserve Act (Act Dec. 23, 1913, ch. 6) rather than the National Bank Act. See *United States Nat'l Bank of Or. v. Indep. Ins. Agents*, ___ U.S. ___, ___, 113 S. Ct. 2173, 2182-86, 124 L. Ed. 2d 402 (1993). Both the parties and the district court at various times refer to the section as part of the National Bank Act. While this nomenclature does not affect the section's validity in light of the Supreme Court case, for clarity's sake this Court will refer to the statute simply as "section 92."

Barnett Marion is a national-bank subsidiary of a bank holding company, Barnett Banks, Inc. Barnett Marion's principal place of business is Ocala, Florida, but it maintains a branch office in Belleview, Florida. Belleview's population is fewer than five thousand, as shown by the last decennial census. Barnett purchased an insurance agency from Linda K. Clifford in Belleview. As a result, Ms. Clifford, a Florida licensed insurance agent, became an employee of Barnett Marion and maintained her office inside the bank.

The day of the purchase, Barnett Marion sought a declaration allowing it to use this branch office to "market insurance to existing and potential customers regardless of where the insurance customers are located." Barnett Marion argued that 12 U.S.C. § 92 preempted Fla. Stat. ch. 626.988, and asked the district court to find that:

Barnett Bank and, specifically Barnett Bank Belleview, is authorized and empowered by federal law to act as an agent for any insurance company authorized by the State of Florida to do business in Florida.

(R1-1-7).

Four days later, the Florida Department of Insurance ("Department") issued an Immediate Final Order ("IFO") directing Linda Clifford and her associate agents to cease insurance agency activities other than selling credit life and credit disability insurance. Barnett Marion moved for a temporary restraining order ("TRO") and sought to enjoin the Department from acting on the IFO.

The district court denied Barnett Marion's motion for TRO and held a hearing on the motion for preliminary

injunction. The court denied the motion for the preliminary injunction and set the case for trial.

The issues before this court are as follow: First, whether Fla. Stat. ch. 626.988 regulates insurance. Second, whether 12 U.S.C. § 92 relates to insurance. Third, whether Barnett Marion is located and doing business in a place with fewer than five thousand people, and if so, whether the bank may sell insurance nationally or only within this small town. To answer these questions of law we must examine the history and purposes of these statutes.

II. JURISDICTION

Upon the Court's request at oral argument, each side briefed the issue of whether the district court had subject matter jurisdiction to decide the case. Based on *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 259 n. 6, 105 S. Ct. 695, 697 n. 6, 83 L. Ed. 2d 635 (1985) and *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S. Ct. 2890, 2899 n. 14, 77 L. Ed. 2d 490 (1983), we find subject matter jurisdiction. The United States Supreme Court specified in *Shaw* that:

The Court's decision today in *Franchise Tax Board v. Construction Laborers Vacation Trust, ante*, [463 U.S.] p. 1, [103 S.Ct. 2841, 77 L. Ed. 2d 420] (1983) does not call into question the lower courts' jurisdiction to decide these cases. *Franchise Tax Board* was an action seeking a declaration that state laws were *not* pre-empted by ERISA. Here, in contrast, companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim *are* pre-empted by ERISA, as well as declarations that those laws are pre-empted.

It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young*, 209 U.S. 123, 160-162 [28 S.Ct. 441, 454-55, 52 L. Ed. 714] (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Id. at 96, n. 14, 103 S.Ct. at 2899, n. 14.

In accord with Supreme Court case law, we hold that a federal court has federal question jurisdiction to decide a claim against a state officer or agency alleging that a federal statute preempts a state statute under the Supremacy Clause and that the state statute cannot be enforced. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

This appeal requires review of the district court's statutory interpretation. Such review is *de novo*. *Centel Cable Television Co. of Fla. v. Thomas J. White Dev. Corp.*, 902 F.2d 905, 908 (11th Cir. 1990); *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1227 (11th Cir. 1990). We review the district court's fact findings in a bench trial for clear error. Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985).

IV. ANALYSIS

A. Findings of Fact

While the parties dispute whether the trial court made findings of fact or merely conclusions of law, none of the parties alleges the trial court erred in its fact-finding. Appellant Barnett Marion's Initial Brief at 16; Appellee Gallagher's Initial Brief at 13; Appellee Underwriter's Initial Brief at 12. Accordingly, we review *de novo* the trial court's conclusions of law.

B. Conclusions of Law.

1. McCarran-Ferguson

In the late 19th Century, the United States Supreme Court held insurance contracts were not in interstate commerce. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L. Ed. 357 (1868). The states then developed extensive insurance regulations. In 1944, the Supreme Court rejected that analysis in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944), holding Congress could regulate insurance under its Commerce Clause power. *Id.* at 553, 64 S. Ct. at 1173-74.

In response, Congress passed the McCarran-Ferguson Act, which proclaimed that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance.*" 59 Stat. 34 (1945), 15 U.S.C. § 1012(b) (emphasis added). This statutory scheme creates a reverse-preemption doctrine for insurance legislation. That is, a state statute that regulates insurance presumptively preempts

a contrary Congressional statute unless the Congressional statute specifically relates to insurance. Congress declared this state regulation to be in "the public interest." 15 U.S.C. § 1011.

With McCarran-Ferguson guiding our analysis, this Court first must ask whether Fla. Stat. ch. 626.988 *regulates* insurance, so as to presumptively preempt contrary federal law. Second, we must ask whether section 92 *specifically relates* to insurance, so that it will fit within the McCarran-Ferguson exception that reinstates federal law as supreme.

2. Florida Law

The state statute at issue, Fla. Stat. ch. 626.988, is part of the Unfair Insurance Trade Practices Act (Part X), located within the Florida Insurance Code. Florida Statute chapter 626.951 declares that:

The purpose of this part [X] is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Pub. L. No. 15, 79th Congress) [McCarran-Ferguson], by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

To this end, Fla. Stat. ch. 626.988 provides, in relevant part:

(2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

Fla. Stat. ch. 626.988(2). Subsection (1)(a) defines a "financial institution" to include any bank or bank holding company, or any subsidiary, affiliate, or foundation thereof. "Specifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census." *Id.* Barnett Marion's status as a national-bank subsidiary removes it from this narrow exception and prohibits it from engaging in insurance activities under the Florida statute.

At first blush, it seems evident that a statutory chapter entitled "Insurance Field Representatives and Operations," Fla. Stat. ch. 626, and a statutory part entitled "Unfair Insurance Trade Practices," Fla. Stat. ch. 626, part X, must regulate insurance. The Supreme Court, however, has cautioned that location informs but does not determine whether a statute regulates "the business of insurance." *United States Dept. of Treasury v. Fabe*, ___ U.S. ___, ___, 113 S. Ct. 2202, 2210, 124 L. Ed. 2d 449 (1993). More important, held the Court, is whether the statute's aim is to regulate "an essential part of the 'business of insurance.'" *Id.*

In *Fabe*, the Supreme Court held that an Ohio statute that accorded policyholders priority over an insolvent insurance company's other creditors was a law enacted to regulate the business of insurance because it regulated policyholders and their relationship to the insurance company. *Id.* at ___, 113 S. Ct. at 2212. Under *McCarran-Ferguson*, this portion of the Ohio statute preempted a contrary federal statute giving the United States priority over other creditors of a bankrupt. *See id.* The Supreme Court in *Fabe* took this "relationship" test directly from *S.E.C. v. Nat'l Sec., Inc.*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969), which involved an Arizona statute designed to protect insurance companies' shareholders. In finding that the Arizona statute was not enacted to regulate the *business* of insurance, the Court held:

The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance" [as used within *McCarran-Ferguson*.] Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the *relationship between the insurance company and the policyholder*. Statutes aimed at protecting or regulating this relationship, *directly or indirectly*, are laws regulating the "business of insurance."

Id. at 460, 89 S. Ct. at 568-69 (emphasis added).

The question we now ask is whether the Florida statute meets this test because it was enacted to protect policyholders by regulating their relationship with the insurer. In the instant case, the trial court relied on state court interpretations of the Florida statute and testimony from the Director of Legal Services for the Florida Department of Insurance to hold that Fla. Stat. ch. 626.988 was enacted to regulate the relationship between insurers and *potential* policyholders or, more broadly, "the insurance-purchasing public at large." (R3-69-12). Specifically, the Florida cases relied on express a concern underlying the statute with overreaching by financial institutions if permitted to sell insurance. The Florida First District Court of Appeals has spoken at least twice on the subject, finding that:

[b]ecause the statute concerns the regulation of insurance, it is a matter within the state's exercise of police power and large discretion is vested in the legislature Concerns regarding financial institutions' entry into insurance activities, including the prevention of coercion, unfair trade practices, and undue concentration of resources, existed at the time of passage of the statute and remain valid today . . . [A] legislature could well have decided that some protection was required.

Glendale Fed. S & L. Ass'n v. Fla. Dept. of Ins., 587 So.2d 534, 536 n.1 and 537 (Fla. 1st Dist. Ct. App. 1991)(citations omitted), *rev. denied*, 599 So.2d 656 (Fla. 1992).

[Moreover,] insurance is an industry affected with a public interest and subject to regulation by the States. The Legislature has determined

that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest.

Prod. Credit Ass'ns of Fla. v. Fla. Dept. of Ins., 356 So.2d 31, 32 (Fla. 1st Dist. Ct. App. 1978).

At trial, the Director of Legal Services for the Florida Department of Insurance, Mr. Shropshire, testified about the need to protect policyholders by regulating the financial stability of insurance companies so that they remain solvent and able to pay claims upon demand, which could be threatened by pressures to make improper insurance decisions. This pressure could force an insurer to assume a bad risk to quickly consummate a bank loan, or could push a bank customer to take out unnecessary insurance where the bank's only motive is profit. While appellant Barnett Marion argues that the statute exists only to protect "independent insurance agents from competition by financial institutions," Appellant's Brief at 35, we disagree. The danger in these situations, as the trial court correctly points out, is the loss of arms-length transactions and objectivity when the bank becomes involved with insurer and insured. "The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders." (R3-69-16).

Relying on the state court interpretations, testimony at trial, reference in the Florida statute to McCarran-Ferguson, and explicit instruction from the United States Supreme Court in *Nat'l Securities* that regulatory protection of policyholders may be indirect, 393 U.S. at 460, 89 S. Ct. at 568-69, the trial court found that Fla. Stat. ch. 626.988

regulates the business of insurance because it protects policyholders. We agree. "Under the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interests of policyholders." *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2208.

3. Section 92

"State laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2211. The question now is whether section 92 specifically requires otherwise. To answer this question, we examine the section's history.

In 1863, the Civil War Congress enacted the National Bank Act, which it then reenacted in 1864. The Act created federally chartered national banks and empowered them to issue and accept a uniform national currency. One section of the National Bank Act limited the indebtedness of national banks. In 1874, Congress revised, reorganized, and reenacted all statutes in effect at the time, including this indebtedness provision, and simultaneously repealed all prior statutes. With minor stylistic changes, Title 62 of the Revised Statutes § 5202 contained the National Bank Act's indebtedness provision.

In 1913, Congress amended Rev. Stat. § 5202 to include a fifth exception to the indebtedness provision. The amendment was a detail of the Federal Reserve Act of 1913, which created Federal Reserve banks and the Federal Reserve Board, and required national banks to become members of the new Federal Reserve System. Finally, in 1916, Congress enacted what we today call section 92. One

portion of section 92 authorized national banks located and doing business in places with fewer than five thousand inhabitants, as shown by the last preceding decennial census, to be agents for any fire, life, or other insurance company authorized to do business in the State where the bank is located.

Two years later, however, Congress repealed all of § 5202 except the indebtedness provision. The story, however, does not end here. In 1982, Congress actually amended section 92. See Garn-St. Germain Depository Institutions Act of 1982, § 403(b), 96 Stat. 1511; see also Competitive Equality Banking Act of 1987, § 201(b)(5), 101 Stat. 583 (imposing a one-year moratorium on section 92 activities). Amid confusion over whether section 92 still lived, the Supreme Court tackled the issue in *United States Nat'l Bank of Or. v. Indep. Ins. Agents*, ___ U.S. ___, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993). Finding the apparent repeal of section 92 to have been mere scrivener's error in placing section 92 in the Rev. Stat. § 5202 rather than the Federal Reserve Act, as the Court divined Congress had intended, the Supreme Court held section 92 had escaped repeal.²

Although *Nat'l Bank of Or.* did not address whether section 92 relates to insurance, it did emphasize at length the relation between section 92 and both the National Bank Act and the Federal Reserve Act, neither of which suggests section 92 relates specifically to insurance or was a specific attempt to preempt state insurance laws. Both Acts concern

² All of the above history of section 92 and the National Bank Act is taken in compacted form from *Nat'l Bank of Or.*, ___ U.S. ___, 113 S. Ct. 2173 (1993). For a more detailed discussion replete with citations and authorities, see Justice Souter's opinion for a unanimous Court, *id.* at ___ - ___, 113 S. Ct. at 2179-82.

banking, not insurance. Moreover, Congress enacted section 92 "at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause." *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2212. As the trial court pointed out, "[e]ven *South-Eastern Underwriters*, which briefly altered the preemption landscape, noted that prior to 1944 Congress 'at no time' had attempted to control the business of insurance." (R3-69-18)(citing 322 U.S. at 544, 64 S. Ct. at 1168-69). Before 1944, both Congress and the Supreme Court understood *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L. Ed. 357 (1868), to place insurance outside the Commerce Clause power. Accordingly, when Congress enacted section 92 in 1916—nearly 30 years before *South-Eastern Underwriters*—Congress could not have been attempting to regulate a business that it believed it had no power to regulate. Congress was concerned with banking, not insurance.

This Court concludes that section 92 neither "specifically relates to the business of insurance," 15 U.S.C. § 1012(b), nor "specifically requires," *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2211, that apparently conflicting state laws be preempted. Accordingly, under McCarran-Ferguson, Fla. Stat. ch. 626.988 need not yield to section 92. Based on this determination that Fla. Stat. ch. 626.988 may proscribe national-bank subsidiaries from conducting insurance activities within Florida, we do not reach the issues of whether, if such banks could sell insurance, they could do it nationally.

V. CONCLUSION

We hold that the district court correctly interpreted both the federal and state statutes at issue in this case.

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Further, we hold that the district court's findings of fact were not clear error. We AFFIRM.

AFFIRMED.

17a

APPENDIX B
839 F. Supp. 835

BARNETT BANK OF MARION COUNTY, N.A.,
a national banking association, Plaintiff,

v.

The Honorable Tom GALLAGHER, Insurance
Commissioner of the State of Florida; The Florida
Department of Insurance, a state agency; Florida
Association of Life Underwriters; Professional
Insurance Agents of Florida, Inc.; and Florida
Association of Insurance Agents, Defendants.

No. 93-178-Civ-Oc-20.

United States District Court,
M.D. Florida,
Ocala Division.

Dec. 3, 1993.

David M. Wells, Mahoney, Adams & Criser,
Jacksonville, FL, for plaintiff.

Robert Prentiss, Office of Legal Affairs, David J.
Busch, Law Office of David J. Busch, Tallahassee, FL, for
Tom Gallagher.

Don Dowdell, Daniel Y. Sumner, Robert Prentiss,
Office of Legal Affairs, David J. Busch, Law Office of
David J. Busch, Tallahassee, FL, for Florida Dept. of Ins.

J. Robert McClure, Jr. Carlton, Fields, Ward, Emmanuel, Smith & Cutler, PA, Tampa FL, Ann M. Kappler, Arti K. Rai, Jenner & Block, Washington, DC, for Florida Ass'n of Life Underwriters, Professional Ins. Agents of Florida, Inc., and Florida Ass'n of Ins. Agents.

OPINION and ORDER

SCHLESINGER, District Judge.

This cause came before the Court on November 19, 1993 on Plaintiff's Motion for a Preliminary Injunction (Doc. No. 4, filed October 25, 1993) and Plaintiff's Renewed Motion filed on November 4, 1993 (Doc. No. 24), consolidated, pursuant to Rule 65(a)(2), Fed. R. Civ. P., with a trial on the merits of the requested declaratory relief.

INTRODUCTION

Plaintiff filed this action for permanent injunctive and declaratory relief on October 18, 1993 asking the Court "to construe the National Bank Act, 12 U.S.C. § [21, *et seq.*], and its preemptive effect on State regulation of federally chartered banking associations." Complaint at ¶ 1. While Fla. Stat. ch. 626.988 precludes bank subsidiaries from engaging in insurance activities in the state of Florida, 12 U.S.C. § 92 ("section 92") allows national banks—presumably without regard to their status as subsidiaries or affiliates—to act as insurance agents in localities where the population is less than 5,000. Accordingly, Plaintiff asserts, the Court should declare, *inter alia*, that the state statute is preempted by the federal one, and that Plaintiff is allowed to act as an insurance agent for any Florida-authorized insurance company.

On October 22, 1993, Defendant Gallagher issued an Immediate Final Order to Cease and Desist to Linda K. Clifford and Linda Clifford Insurance, Inc. ("LCI"), an insurance agency purchased by Plaintiff on October 18, 1993. Defendant Gallagher ordered Clifford and LCI, in light of their current association with Plaintiff, to cease and desist from any and all insurance agency activity other than credit life insurance and credit disability insurance.

On October 25, 1993, Plaintiff filed a Motion seeking immediate injunctive relief in the form of either a Temporary Restraining Order ("TRO") or a Preliminary Injunction. The Court found that Plaintiff failed to demonstrate that the alleged injury was "*so imminent* that notice and a hearing on the application for preliminary injunction is impractical if not impossible." Local Rule 4.05(b)(2). Accordingly, that portion of the Motion seeking a TRO was denied.

The Court heard argument on the Motion for a Preliminary Injunction on October 27, 1993, left intact its prior ruling on the TRO, and set the matter for a consolidated trial and hearing on the Motion for Preliminary Injunction.

Defendants have counterclaimed against Plaintiff, asking the Court for the *opposite* declaratory relief, namely, that section 92 *prohibits* Plaintiff from, *inter alia*, soliciting insurance or acting as an agent for others soliciting insurance in such localities.

Having presided over the trial in this matter, and having considered the entire record, the Court makes the following findings of fact and conclusions of law.

**FINDINGS OF FACT AND
CONCLUSIONS OF
LAW**

Plaintiff, a subsidiary of the bank holding company Barnett Banks, Inc., is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21, et seq. Plaintiff maintains its principal place of business in Ocala, Florida, and engages in the business of banking there and elsewhere within Marion County, Florida. Plaintiff owns and operates a branch bank located in Belleview, Florida, the population of which, according to the last decennial census, is less than 5,000.

Prior to October 18, 1993, LCI operated from Belleview as a general lines agent for insurance companies authorized to do business in Florida. On that date, Plaintiff purchased certain of LCI's assets, including its name, and LCI's employees became employees of Plaintiff. The decision to purchase the assets of LCI was made by Plaintiff, based upon the recommendation of the Executive Committee of Barnett Banks, Inc., which is the largest bank holding company headquartered in Florida and one of the largest in the southeastern United States.

Plaintiff has stated that all insurance sales made through the insurance division of Barnett Belleview are made from the office in Belleview through Linda Clifford or licensed agents acting under her supervision. Linda Clifford is licensed in the state of Florida as life, health and general lines insurance agent, and is subject to the jurisdiction and regulation of Defendant Florida Department of Insurance ("DOI") pursuant to Chapters 624 and 626, Florida Statutes. Linda Clifford has insurance customers both inside and outside of incorporated Belleview. The Belleview branch of

Plaintiff has banking customers inside and outside of incorporated Belleview.

With respect to all insurance sales conducted by the insurance division of its Belleview branch, Plaintiff's stated intent is that such insurance will be marketed to existing and potential customers regardless of where they are located, subject only to the requirements that (1) such sales be conducted only on behalf of insurance companies licensed to [do] business in Florida and (2) such insurance not be sold from bank branches in towns whose population is in excess of 5,000.

On its face, section 626.988 purports to prevent the insurance agency activities of the Plaintiff's Belleview branch.

Section 92

As enacted in 1916, section 92 of the Federal Reserve Act¹ provides that

any [national banking] association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as agent for any . . . insurance company authorized by the

¹ Although the parties—and the Court in at least one prior Order — have referred to section 92 as being part of the National Bank Act, the Supreme Court, as discussed *infra*, has deemed the statute instead to be part of the Federal Reserve Act. See *U.S. Nat'l Bank of Or. v. Independent Ins. Agents*, ___ U.S. ___, ___, 113 S. Ct. 2173, 2185, 124 L. Ed. 2d 402 (1993).

authorities of the State in which said bank is located to do business in said State . . .

12 U.S.C. § 92. In 1963 the Comptroller issued a ruling that this section allows a branch of a national bank located in a community the population of which is 5,000 or less to sell insurance, even though the principal office of that bank may be in a community whose population *exceeds* 5,000. This policy presently is codified at 12 C.F.R. § 7.7100 (1993). The fact that 12 U.S.C. § 92 presently does not appear in the United States Code, and has not for some time, led at least two circuits to opposite conclusions regarding whether or not the section actually continued to exist. However, the Supreme Court recently resolved this inter-circuit conflict, stating that a 1918 amendment neither repealed nor affected section 92, *which section remains current law. See Nat'l Bank of Or.*, ___ U.S. at ___-___, 113 S. Ct. at 2182-86.

Accordingly, there is no question that section 92 remains the law of the land. Moreover, this section places no limitations on the geographic scope of insurance sales authorized thereunder. *See Independent Ins. Agents v. Ludwig*, 997 F.2d 958, 961 (D.C. Cir. 1993). Thus, provided that the bank is selling the insurance *from* a community of fewer than 5,000 inhabitants, there are no limits as to *where* the insurance may be sold. However, Defendant Gallagher, while accepting that proposition, also appears to ask the Court to read into section 92 a further requirement that such banks' activities *be confined* to such localities. The Court finds no such restriction within the language of section 92. Thus, even if it is true that, as alleged by Defendant, only 35% of Plaintiff's business is located in Bellevue, that fact would not deprive Plaintiff of

standing to assert that its activities should be deemed permissible under that statute.²

Nevertheless, while *Ludwig* is highly instructive, it involved no state scheme alleged to contravene section 92, as does the case at bar. There was no patent federal-state conflict in *Ludwig*, and thus it did not present the preemption issues such as presently are before the Court.

Florida statute 626.988

Section 626.988 of the Florida statutes provides, in relevant part:

(2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

Fla. Stat. ch. 626.988(2). The statute defines a "financial institution" as, inter alia, any bank or bank holding company, or any subsidiary, affiliate, or foundation thereof. *Id.* at 626.988(1)(a). However, "specifically excluded" from this definition is a bank which is *not* a subsidiary or affiliate of a bank holding company and which is located in a city having a population of less than 5,000. *Id.* Thus, the legislature met federal section 92 halfway: banks in such communities are allowed under Florida law to sell insurance,

² Accordingly, the Court is not required to make any factual finding concerning the percentage of Plaintiff's business that is located in Bellevue.

but only if they are not subsidiaries or affiliates of a (larger) bank holding company.

As stated above, Plaintiff Barnett Marion is a subsidiary of the bank holding company Barnett Banks, Inc. Plaintiff's principal place of business is Ocala, Florida. Included among Plaintiff's business is the operation of a branch bank in Belleview, Florida, a town with a population of less than 5,000. Accordingly, Plaintiff asserts that it is authorized to engage in Belleview in insurance agency activities. Plaintiff asserts that the Florida statute is in direct conflict with section 92. Therefore, Plaintiff argues, this Court should render a declaration that the Florida provision is preempted by section 92, and that Plaintiff is allowed to engage in insurance activities.

Defendants contend in opposition that the Florida statute is a law regulating the business of insurance, that section 92 is not such a law and, therefore, that the McCarran-Ferguson Act, 15 U.S.C. § 1011, et seq. ("McCarran-Ferguson" or "the Act"), *infra*, saves section 626.988 from preemption.

The Court notes that this is a particularly "close" case. The questions presented are not particularly susceptible to easy resolution, especially in light of the dearth of precedent in this area. Nevertheless, the disposition of the matter may be simplified as follows: For Plaintiffs to prevail, the Court must find that section 92 is a "bank" law; that section 626.988 is a "bank" law; and, therefore, that the Florida provision, as inconsistent with federal law, is preempted and superseded by section 92. For Defendants to prevail, the Court must find that section 626.988 is a law enacted for the purpose of regulating the business of insurance; that section 92 does not specifically relate to the business of insurance; and, therefore, that

McCarran-Ferguson exempts section 626.988 from any preemption, thus allowing 626.988 to remain effective, even with the continued existence of section 92.³

Preemption and McCarran-Ferguson

In relevant part, the McCarran-Ferguson Act states:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the Purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b). The Act was passed by Congress in 1945 as an immediate response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944). Noting that the "modern insurance business holds a commanding position in the trade and commerce of our Nation," *id.* at 539, 64 S. Ct. at 1166, the Court there had held, for the first time, that insurance activity conducted across state lines was subject to the regulatory power of Congress under the Commerce Clause, in particular, the antitrust laws, *id.* at 562, 64 S. Ct. at 1178. By subsequently enacting McCarran-Ferguson, Congress "attempt[ed] to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain in *state* regulation." *SEC v.*

³ In the alternative, Plaintiff could prevail under a McCarran-Ferguson analysis if the Court found that section 92 was specifically related to the business of insurance, and if 626.988 is deemed to be a law enacted for the purpose of regulating insurance. However, Plaintiff has consistently stated and/or conceded that section 92 is a "bank" law, and has premised its arguments accordingly.

National Securities, Inc., 393 U.S. 453, 459, 89 S. Ct. 564, 568, 21 L. Ed. 2d 668 (1969) (emphasis supplied).

The declaration-of-intent section of McCarran-Ferguson is particularly notable, wherein Congress stated that "the continued regulation and taxation by the several states of the business of insurance is in the public interest." 15 U.S.C. § 1011. Congress' purpose was to provide "support to the existing *and future* state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429, 66 S. Ct. 1142, 1155, 90 L. Ed. 1342 (1946) (emphasis supplied). Thus, while within the previous year the Supreme Court had stated that "[w]e cannot make an exception of the business of insurance," *South-Eastern Underwriters*, 322 U.S. at 553, 64 S. Ct. at 1173, Congress' response, emphatically, was that it most certainly could.

Under McCarran-Ferguson, then, the Court's initial inquiry must be to determine whether section 626.988 is a law enacted by the state of Florida "for the Purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

Upon cursory review, one might easily conclude that section 626.988 *is* such a law, as the provision is found in the middle of the myriad of Florida's insurance rules, in the statutory chapter (626) entitled "Insurance Field Representatives and Operations." Section 626.988 in particular is set in this chapter's Part X, entitled "Unfair Insurance Trade Practices." Nevertheless, the Supreme Court has cautioned—as recent as its last term—that with respect to this inquiry, "mere matters of form need not detain us." *U.S. Dep't of Treasury v. Fabe*, ___ U.S. ___, ___, 113 S. Ct. 2202, 2210, 124 L. Ed. 2d 449 (1993) (quoting *National Securities*, 393 U.S. at 460, 89 S. Ct. at 568). Thus, while the Court finds the "location" of section

626.988 to be *relevant*, it is not the sole factor upon which this inquiry turns.

Instead, the Court must attempt to gauge the larger intent and design of section 626.988. In *Fabe* the Court stated that this "broad category" consists of those laws possessing the "'end, intention or aim' of adjusting, managing or controlling the business of insurance." ___ U.S. at ___, 113 S. Ct. at 2210 (citation omitted). *Fabe* involved an Ohio statute which accorded the United States fifth priority in bankruptcy proceedings involving insurers. The question presented was whether the Ohio statute was preempted by a federal priority statute according the United States first priority with respect to a bankrupt debtor's obligations. The Court concluded that the Ohio priority statute, to the extent that it furthers the interests of policyholders—indeed, to the extent that it "regulates" policyholders—was a law enacted for the purpose of regulating the business of insurance. *Id.* ___ U.S. at ___, 113 S. Ct. at 2212. Accordingly, that portion of the Ohio statute was saved from preemption under McCarran-Ferguson.⁴

Fabe was not the first instance in which the Court considered the relationship between insured and insurer in applying McCarran-Ferguson. In the *National Securities* case, the Court observed that the focus of the Act was "on the relationship between the insurance company and the policy-holder," and that "[s]tatutes aimed at protecting or regulating this relationship, *directly or indirectly*, are laws regulating the 'business of insurance.'" 393 U.S. at 460, 89 S. Ct. at 569 (emphasis supplied).

⁴ To the extent that it was designed to further the interests of other "creditors," however, the Ohio statute was *not* a law enacted for the purpose of regulating the business of insurance.

Simply put, section 626.988 purports to prevent certain entities from selling insurance. Thus, it would appear to define or regulate a relationship between insurer and *potential* policyholder, that is, the insurance-purchasing public at large, rather than one between insurer and *present* policyholder. In light of this, does the McCarran-Ferguson Act and its relevant jurisprudence, noted above, still apply? Particularly in light of state court construction of section 626.988, the Court would answer in the affirmative.

In *Glendale Federal S & L v. Dept. of Ins.*, 587 So.2d 534 (Fla. 1st DCA 1991), *rev. denied*, 599 So.2d 656 (Fla. 1992), a Florida appellate court affirmed a final summary judgment that section 626.988 did not violate the equal protection clause of the Fourteenth Amendment. The court affirmed and specifically referenced the Circuit Court's finding that:

Concerns regarding financial institutions' entry into insurance activities, including the prevention of coercion, unfair trade practices, and undue concentration of resources, existed at the time of passage of the statute and remain valid today . . .

[A] legislature could well have decided that some protection was required.

587 So.2d at 536 n. 1 and 537. In an earlier decision construing whether certain entities were "financial institutions" with the meaning of section 626.988, the same court noted:

Insurance is an industry affected with a public interest and subject to regulation by the States. The Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of

employees of financial institutions is not in the public interest.

Production Cr. Ass'ns of Fla. v. Dept. of Ins., 356 So.2d 31, 32 (Fla. 1st DCA 1978).

Plaintiff also notes, correctly, that neither of those cases dealt with the McCarran-Ferguson Act. Nevertheless, the Court would be most remiss if it were to not consider these opinions merely because they addressed different *legal* challenges. For example, *Glendale* involved an equal protection challenge, and the Court notes, emphatically, that the instant Complaint raises no such challenge. However, that the *Glendale* court proposed its findings concerning section 626.988 in the context of citing a "rational basis" for the statute does not mean that the "rationale" stated therein cannot be considered by this Court.

The parties to the instant matter appear to be at odds over the extent to which this Court should defer to those state court findings, particularly those made within *Glendale*. Defendants cite the case of *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981) for the proposition that a state court's interpretation of a state statute may be rejected only if it "could not have been a goal of the legislation." *Id.* at 470, 101 S. Ct. at 1205. Plaintiff, on the other hand, argues that *Michael M.* is inapposite, as it, like *Glendale*, involved an equal protection challenge, a context in which state court determinations are more generally entitled to great deference.

However, this Court needs no Supreme or other Court precedent to instruct it in the degree to which it may—or must—defer to state court interpretations of a *state* statute. The Florida courts—in particular the District Courts of Appeal—routinely are called on to evaluate, apply and

interpret the Florida statutes, and do this far more often than the federal district courts sitting in this state. Thus, at least to the undersigned, it goes without saying that a *great* degree of deference ought to be given such decisions. State judges in Florida are just as capable and competent—if not more so—to interpret state laws as any federal judge.

In *National Securities*, the Supreme Court held that statutes aimed at protecting the relationship between insurer and insured, "*directly or indirectly*," are statutes regulating the business of insurance. 393 U.S. at 460, 89 S. Ct. at 568. The Court construes the term "policyholder" in its broadest sense, as to encompass both existing and potential purchasers of insurance. Future policyholders, then, are "indirectly" affected by regulations such as section 626.988. Thus, the Court finds that Florida section 626.988 indirectly protects the relationship between insurer and insured because it is aimed at protecting the insurance purchasing public at large. This law "furthers the interests," *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2208, of the potential policyholding public, regulates the potential policyholding public and, therefore, is a "law enacted for the purpose of regulating the business of insurance" within the meaning of *McCarran-Ferguson*.

Additionally, this last point is supported by the trial testimony of Douglas Alan Shropshire, who is Director of Legal Services for Defendant DOI. In describing how DOI enforces the state's insurance laws, Shropshire related the need for protection of policyholders through regulating the financial stability of insurance companies. The concern of the state is that insurance companies remain solvent and have the ability to pay claims when demands are made. Such regulation by the state, according to Shropshire, often requires insurance companies and agents to abide by certain actuarial requirements in determining the extent of the risk

involved in the coverage. The state's concern, then, is that insurance not be sold through institutions which require such coverage in order to conduct other business, and that such institutions would be lax or indifferent to enforcing actuarial standards. Shropshire stated that such institutions, particularly banks, might require their customers seeking loans for certain properties (e.g., home or automobile) to purchase "needed" insurance through the institution's insurance agent.

The Court concurs with the concerns noted by the witness. For example, in order to make a profit on automobile loans or home mortgages, the insurance agents may incur business they might otherwise reject because they would be pressured by the bank to do so in order to consummate the bank's loan transactions. This might lead to the over-insurance of risky business, which could result in the insolvency of the insurer.

Additionally, and notwithstanding the existence of specific prohibitions on coercive credit extension, the Court finds that loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-length relationship be maintained among the bank, the loan officer and the insurance agents. The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders.

Furthermore, the Court notes that the declaration or purpose section of Part X of chapter 626, in which section 626.988 is located, specifically references the *McCarran-Ferguson Act*:

The purpose of this part is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Pub. L. No. 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Fla. Stat. ch. 626.951(1). The statute also specifically refers to section 92. *See id.* at 626.988(8). Thus, the Florida legislature was keenly aware that McCarran-Ferguson specifically affected section 92, and that in enacting section 626.988 the legislature made it clear that this was an *insurance* law, not a banking law.

Having concluded that section 626.988 is such a law, the Court must then determine the preemptive effect, if any, of section 92 of the Federal Reserve Act. As stated in *Fabe*,

The McCarran-Ferguson Act did not simply overrule *South-Eastern Underwriters* and restore the status quo. To the contrary, it transformed the legal landscape by overturning the normal rules of preemption. Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) [of the Act] reverses this by imposing what is, in effect, a clear-statement rule, a rule that *state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.*

___ U.S. at ___, 113 S. Ct. at 2211 (emphasis supplied). Thus, unless section 92 *specifically* relates to the business of

insurance," 15 U.S.C. § 1012(b), or expressly requires that state law be preempted, then the validity and effectiveness of Florida's section 626.988 is not disturbed by section 92.

In *National Bank of Oregon*, the Supreme Court stated that section 92 "remains in force." ___ U.S. at ___, 113 S. Ct. at 2187. In reviewing the context of that legislation, and stating that "section 92 travels together with the paragraphs around it," *id.* ___ U.S. at ___, 113 S. Ct. at 2185, the Court noted that section 92 was placed between new provisions granting additional powers to Federal Reserve banks (which had existed only for three years prior to the 1916 addition of section 92) and also subjecting powers of such banks to regulation by the Federal Reserve Board. The Court did not address the question of whether section 92 was "specifically related" to the business of banking or insurance, but its emphasis on these amendments—in particular, section 92—being a part of the *Federal Reserve Act* does not tend to suggest that section 92 either is specifically related to the business of insurance or that Congress specifically intended that section 92 preempt state insurance laws.

Most significantly, though, section 92 fails to satisfy *Fabe's* (really McCarran-Ferguson's) clear statement rule. As Plaintiff notes, section 92 does contain plain language entitling national banks to act as insurance agents under limited circumstances. However, section 92 simply fails to manifest any express intent to preempt state insurance laws. That silence is particularly understandable given the historical *fact* that section 92 was enacted "at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause." *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2212. Even *South-Eastern Underwriters*, which briefly altered the preemption landscape, noted that prior to 1944 Congress "at no time"

had attempted to control the business of insurance. 322 U.S. at 544, 64 S. Ct. at 1168. Until that decision was rendered, neither Congress nor the Court believed that insurance fell under the Commerce Clause. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L. Ed. 357 (1869) (issuing policy of insurance "not a transaction of commerce"). Thus, in 1916, when section 92 was enacted, Congress could not have been attempting to regulate the business of insurance.

One other district court, -faced with a somewhat analogous apparent conflict between section 92 and a state insurance regulation, held unequivocally that section 92 was a "bank" law:

The "business of insurance" has been narrowly defined, and it seems fairly obvious that § 92 does not constitute Congressional regulation of that business. This section[']s . . . function is to grant additional powers to national banks. That the power involves insurance does not transform this section into a regulation of the business of insurance.

Owensboro Nat'l Bank v. Moore, 803 F. Supp. 24, 36 (E.D. Ky.1992).⁵

⁵ In that case a Kentucky statute prohibited any person owning greater than one-half the capital stock of a bank from acting as an insurance agent or broker, with the exception of certain credit-type insurance. Finding section 92 to be "contrary federal law," the court concluded with "no difficulty," that section 92 preempted the Kentucky statute. 803 F. Supp. at 35.

Additionally, the outcome of that court's McCarran-Ferguson analysis differed from that in the present case, Judge Hood finding that the Kentucky statute did not constitute insurance regulation. *Owensboro*, however, is distinguishable for three important reasons. First, there was no state caselaw upon which Judge Hood could rely for the meaning and/or purpose of the state regulation. Second, the

Accordingly, the Court concludes that section 92 neither "specifically relates to the business of insurance," 15 U.S.C. § 1012(b), nor "specifically requires," *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2211, that apparently conflicting state laws be preempted. Thus, under McCarran-Ferguson, section 626.988 is saved from preemption.

As noted above, this case presents difficult questions concerning the interplay between federal and state legislation. Yet while the denouement of the present lawsuit will immediately frustrate Plaintiff's attempts to sell insurance, Plaintiff is not without other, more appropriate avenues of relief. In short, to remedy to this perceived inequity, Plaintiff and similarly situated financial institutions should consider looking neither to the Comptroller of Currency nor the federal courts, but rather, as a distinguished jurist once pointed, "to Congress." *Saxon v. Georgia Ass'n of Independent Ins. Agents, Inc.*, 399 F.2d 1010, 1021 (5th Cir.1968) (Thornberry, J., concurring).

In accordance with the terms of this Opinion and Order, Plaintiff's Motions for a Preliminary Injunction (Docs. No. 4 and 24) are **DENIED**, and Plaintiff's request

Kentucky provision was located within that chapter of the state statutes regulating banks and trust companies, not that portion which regulates insurance. Lastly, the court there applied the tripartite test announced in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982) for determining whether a state law governs the "business of insurance." As the subsequently decided *Fabe* made clear, and as the instant Defendants have duly noted, the *Pireno* test applies to the *second* clause of McCarran-Ferguson (relating to the scope of antitrust immunity), while the instant analysis—and that in *Fabe*—relates to the *first* clause of the Act. In this vein, it should also be noted that *Fabe* was a Sixth Circuit case, and was remanded to that court of appeals, before which an appeal from *Owensboro* presently lies.

for permanent injunctive and declaratory relief is **DENIED** in its entirety. In light of this holding, Defendants' counterclaims are **MOOTED**.⁶

The Clerk hereby is directed to (1) enter judgment for Defendants on Plaintiff's Complaint; (2) tax costs accordingly; and (3) close the file.

DONE AND ORDERED.

⁶ By virtue of the Court's refusal to enjoin Defendant Gallagher's enforcement of the Cease and Desist Order, Plaintiff cannot sell insurance out of its Belleview branch. Thus, all the other requests set forth in the Counterclaims are moot, and the Court would furthermore be required to render advisory opinions, which it may not do under the case or controversy requirement of Article III of the Constitution.

APPENDIX C
Unreported

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
March 28, 1995

No. 93-3508

BARNETT BANK OF MARION COUNTY, N.A.,
a national banking association,

Plaintiff-Counter-Defendant-Appellant,
Cross Appellee,

versus

TOM GALLAGHER, Insurance Commissioner of the State
of Florida; FLORIDA DEPARTMENT OF INSURANCE,
a state agency,

Defendants-Appellees,
Cross-Appellants,

FLORIDA ASSOCIATION OF LIFE UNDERWRITERS;
PROFESSIONAL INSURANCE AGENTS OF FLORIDA,
INC.; FLORIDA ASSOCIATIONS OF INSURANCE
AGENTS,

Defendants-Counter-Claimants-Appellees,
Cross-Appellants.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: COX, Circuit Judge, FAY, Senior Circuit Judge,
and CARNES*, District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/ Emmett R. Smith
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

*Honorable Julie E. Carnes, U.S. District Judge for the
Northern District of Georgia, sitting by designation.

APPENDIX D
44 F.3d 388

THE OWENSBORO NATIONAL BANK;

**The First National Bank of Louisa; Citizens
National Bank of Paintsville; Kentucky Bankers
Association, Plaintiffs-Appellees,**

**United States of America, Intervening
Plaintiff-Appellee,**

v.

**Don W. STEPHENS, Commissioner, Department of
Insurance, Commonwealth of Kentucky, Defendant-
Appellant (92-6330),**

**Kentucky State Association of Life Underwriters,
Independent Insurance Agents of Kentucky, Inc.;
Kentucky Association of Professional Insurance Agents,
Intervening Defendants-Appellants (92-6331).**

Nos. 92-6330, 92-6331

United States Court of Appeals,
Sixth Circuit.

Argued Sept. 29, 1994.

Decided Dec. 29, 1994.

M.T. Senn (argued and briefed), Morgan &
Pottinger, Louisville, KY, M. Brooks Senn, Kentucky
Bankers Ass'n, Louisville, KY, for plaintiffs-appellees.

Joseph L. Famularo, U.S. Atty., Lexington, KY, Anthony J. Steinmeyer, Jacob M. Lewis (argued and briefed), Dept. of Justice, Appellate Staff, Civil Div., Rosa M. Koppel, Office of Comptroller of Currency, Paul W. Bridenhagen, Anne L. Weismann, Dept. of Justice, Washington, DC, for intervenor-appellee in No. 92-6330.

Stephen B. Cox (briefed), Kentucky Dept. of Ins., Frankfort, KY, Ann M. Kappler (argued and briefed), Jenner & Block, Washington, DC, for defendant-appellant.

Michael F. Crotty (briefed), American Bankers Ass'n Washington, DC, for amicus curiae American Bankers Ass'n.

Joseph L. Famularo, U.S. Atty., Lexington, KY, Rosa M. Koppel, Office of Comptroller of Currency, Paul W. Bridenhagen, Anne L. Weismann, Dept. of Justice, Washington, DC, for intervenor-appellee in No. 92-6331.

Jonathan B. Sallet, Ann M. Kappler (argued), Jenner & Block, Washington, DC, Terrell L. Black, Larry R. Blanton, Black, Carle, Maze & Wilmes, Louisville, KY, for intervenors-appellants.

Before GUY and BATCHELDER, Circuit Judges; and McKEAGUE, District Judge. *

RALPH B. GUY, Jr., Circuit Judge.

Defendants, the Commissioner of the Kentucky Department of Insurance ("Commissioner") and various Kentucky insurance industry associations, appeal the district

* Honorable David W. McKeague, United States District Court for the Western District of Michigan, sitting by designation.

court's grant of summary judgment in favor of plaintiffs, which are national banks doing business in Kentucky towns with populations of fewer than 5,000 persons. The district court concluded that a Kentucky statute that bars bank holding companies from acting as insurance agents was preempted by a federal statute that allows national banks operating in towns of fewer than 5,000 persons to act as insurance agents. On appeal, defendants argued that the Kentucky statute, Ky. Rev. Stat. Ann. § 287.030(4) ("section 287"), does not conflict with the federal statute, 12 U.S.C. § 92, and that, in any event, the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, and section 7 of the Bank Holding Companies Act, 12 U.S.C. § 1846, each "immunize" section 287 from preemption by § 92. We reject these arguments and affirm.

I.

In late 1990, plaintiffs submitted to the Commissioner requests for applications for licenses to act as life and general line insurance agents in Kentucky. The Commissioner denied these requests, but scheduled a hearing before a state administrative law judge ("ALJ") on the issue of whether section 287 barred plaintiffs from acting as insurance agents. Before the hearing was held, however, plaintiffs filed this lawsuit, seeking declaratory and injunctive relief. A Kentucky state court thereafter granted plaintiffs' request for a stay of the administrative proceedings pending the outcome of this lawsuit. Meanwhile, a number of Kentucky insurance industry associations intervened on behalf of the Commissioner in this lawsuit. The United States intervened on behalf of plaintiffs. Defendants filed a motion to dismiss, arguing that the case was not justiciable because of the unfinished administrative proceeding before the ALJ. Plaintiffs then filed a motion for summary judgment, to which defendants responded by filing a cross-

motion for summary judgment. In a published opinion, *see* 803 F. Supp. 24 (E.D. Ky. 1992), the district court determined that the case was justiciable,¹ granted plaintiffs' motion for summary judgment, and granted plaintiffs the relief they sought. This appeal followed.

II.

Defendants first argue that section 287 is not preempted by § 92 under conventional preemption analysis. Section 287 provides:

No person who after July 13, 1984, owns or acquires more than one-half(½) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgagee in mortgage property, other than title insurance.

Ky. Rev. Stat. Ann. § 287.030(4). Section 92 provides:

In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, *may*, under such rules and regulations as may be prescribed by the Comptroller of the Currency, *act as the agent for any fire, life, or other insurance*

¹Defendants have not raised any justiciability issues on appeal, and the district court appears to have decided them correctly.

company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; *and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: Provided, however,* That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

12 U.S.C. § 92 (emphasis added).

It is well settled that "the Supremacy Clause, U.S. Const. Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 712 (1985). One of the ways in which a state law may "interfere" with a federal law is by coming into "actual[] conflict[]" with it, *i.e.*, by 'stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]'" *Id.* at 713.

The Supreme Court has applied this "actual conflict" standard in cases with facts similar to those presented here. In *Franklin National Bank v. New York*, 347 U.S. 373 (1954), the Court considered whether a New York law that prohibited use of the word "savings" in advertising for banks other than state-chartered savings banks was preempted by a federal law that authorized national banks "to receive

deposits without qualification or limitation, and . . . [to] possess 'all such incidental powers as shall be necessary to carry on the business of banking[.]'" *Id.* at 376. Although the federal law only implicitly permitted federal banks to use the word "savings" in their advertising, the Court concluded that there was "a clear conflict between the law of New York and the law of the Federal Government." *Id.* at 378. Similarly, in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), the Court considered whether a California law that prohibited the inclusion of a due-on-sale clause in loan instruments was preempted by a federal regulation that expressly granted to federal savings and loans the power to include such clauses in loan instruments. Noting that the conflict between the state law and federal regulation did not "evaporate" because the "regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts[.]" *id.* at 155, the Court easily concluded that preemption was appropriate. *Id.* at 159.

The conflict between section 287 and § 92 is no different than those present in *Franklin National Bank* and *de la Cuesta*. For purposes of deciding the federal preemption issue only, the plaintiff national banks assumed as correct the Commissioner's position that section 287 applies not only to bank holding companies but also to subsidiaries thereof, such as national banks. Thus, while § 92 provides that national banks such as plaintiffs "may" act as insurance agents, section 287 provides that they "may not."

Seizing upon the permissive nature of the right created by § 92, however, defendants suggest that we should "reconcile" the two sections by construing the right created by § 92 to be subject to state law restrictions such as section 287. That construction might be plausible if § 92 provided that certain national banks "may have the power" to act as

insurance agents. But § 92 actually states that certain national banks "may under such rules. . . as may be prescribed by the Comptroller of the Currency, *act as the agent for*" certain insurance companies. Providing that a bank "may act" is no different than providing that a bank "shall have the power to act." Thus, the language of § 92 does not permit the construction defendants advocate. That the power created by § 92 is permissive does not allow us to conclude that it does not exist.²

Defendants also contend that our construction of § 92 assumes that Congress acted with an "unconstitutional motive" in passing § 92, since the regulation of the business of insurance was understood to be beyond Congress's Commerce Clause powers when § 92 was passed in 1916. But § 92 in no way governs the manner in which the business of insurance is conducted; rather, it merely helps to define the powers of national banks. Congress has been understood to have the authority to define those powers since the Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), so we reject defendants' contention.

Finally, we note that section 287 interferes with the realization of a chief object of § 92. That object is to increase the number of banks serving small towns by creating "additional sources of revenue" for such banks. Letter from Comptroller John Skelton Williams to Sen.

² The United States emphasizes that, in a 1990 letter to the Louisiana Commissioner of Insurance, the Chief Counsel of the Office of the Comptroller concluded that the right created by § 92 is not subject to state law restrictions. Because we reach the same conclusion without taking this letter into account, we need not determine whether such an informally expressed opinion is entitled to deference under the doctrine set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Robert L. Owen, *reprinted in* 53 Cong. Rec. 11001 (1916). (App. at 159). Section 287 removes that source of revenue and thus "create[s] 'an obstacle to the accomplishment and execution of the *full* purposes and objectives [of Congress].'" *de la Cuesta*, 458 U.S. at 156 (emphasis added). Like the district court, we conclude that, under conventional preemption analysis, § 92 preempts section 287.

Defendants next argue that the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, "immunizes" section 287.030(4) from preemption by § 92. The relevant portion of the McCarran-Ferguson Act provides:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance

15 U.S.C. § 1012(b). Thus, section 287.030(4) is not preempted by § 92 if (1) section 287 was "enacted . . . for the purpose of regulating the business of insurance," and (2) § 92 does *not* "specifically relate[] to the business of insurance.

We first consider whether section 287 was "enacted . . . for the purpose of regulating the business of insurance." The "business of insurance" is made up of "practices" and "activities" that satisfy the criteria set forth in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982). Those criteria are:

first, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the

policy relationship between the insurer and insured; and *third*, whether the practice is limited to entities within the insurance industry.

Id. at 129.

Citing *United States Department of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), however, defendants contend that the *Pireno* criteria are "not applicable" to the determination of whether a state law was "enacted . . . for the purpose of regulating the business of insurance." (Defendants' Brief at 24 n.22). We disagree. It is true that *Pireno* addressed the scope of the antitrust immunity arising under the second clause of § 1012(b). That clause provides an exemption from federal antitrust laws for activities that (1) are regulated by state law and (2) qualify as the "business of insurance." See 15 U.S.C. § 1012(b). Thus, "the first clause [of § 1012(b)] commits laws 'enacted . . . for the purpose of regulating the business of insurance' to the States, while the second clause exempts only 'the business of insurance' itself from the antitrust laws." *Fabe*, 113 S. Ct. at 2209. Whether a particular activity is part of the "business of insurance" is, of course, a separate question from whether a state law was "enacted . . . for the purpose of regulating the business of insurance." The *Fabe* Court accordingly noted that the latter question cannot be answered by reference to the *Pireno* criteria alone. But that does not mean those criteria simply are "not applicable" in cases involving the first clause of § 1012(b). If, in such a case, the issue arises of whether a particular activity is part of the "business of insurance," the *Pireno* criteria apply. See *Fabe*, 113 S. Ct. at 2208 (noting in considering claim that arose under first clause of § 1012(b), that *Pireno* "identified the three criteria . . . that *are* relevant in determining what activities constitute the 'business of insurance.'" (emphasis added). In short, the *Fabe* Court merely noted that the scope of the

respective immunities created by the first and second clauses of § 1012(b) are different; it assuredly did not give "business of insurance" one meaning in the first clause and a different meaning in the second.

The *Fabe* Court went on to hold that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." 113 S. Ct. at 2210. Thus, to have been "enacted . . . for the purpose of regulating the business of insurance," section 287 must possess the aim of regulating activities that meet the *Pireno* criteria.

Section 287 does not possess such an aim. That section helps to define the powers of Kentucky bank holding companies by excluding such companies from participation in the activities that constitute the "business of insurance." Excluding a person from participation in an activity, however, is different from regulating the manner in which that activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity. Section 287 only regulates persons owning "more than one-half (1/2) of the capital stock of a bank"; it in no way governs the manner in which the activities constituting the "business of insurance" are conducted. Section 287 thus is different in kind from the Ohio statute that was found to regulate the business of insurance in *Fabe*, since the Ohio statute set standards for "the actual performance of an insurance contract." 113 S. Ct. at 2210. *See also United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356, 364 (3rd Cir. 1986) (state law forbidding banks from being licensed as insurers "ha[d] no part in the business of insurance under McCarran-Ferguson"); *but see SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969) (stating in dicta that state laws

governing "the licensing of [insurance] companies and their agents . . . [are] within the scope of" McCarran-Ferguson).

Since we conclude that section 287 was enacted for the purpose of regulating certain conduct by bank holding companies, not the business of insurance, we need not consider whether § 92 "specifically relates to the business of insurance"; for, without regard to whether § 92 so relates, McCarran-Ferguson cannot save section 287 from preemption.

Defendants' remaining argument is that section 287 cannot be preempted by § 92 because "section 7 of the Bank Holding Company Act [12 U.S.C. § 1846] expressly reserves to the Commonwealth the authority to regulate bank holding companies, and their subsidiaries, through state regulation such as [section 287]." (Defendants' Brief at 28). In making this argument, defendants ignore the plain language of § 1846, which provides:

No provision of *this chapter* shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof.

12 U.S.C. § 1846 (emphasis added). Here, § 92 is the provision that prevents Kentucky from exercising the power to enforce section 287. Section 92 is found in chapter 2 of title 12, while § 1846 is found in chapter 17 of that title. Since § 92 is a provision of a chapter other than the chapter in which § 1846 is found, § 92 may be construed to prevent

Kentucky from exercising the power to enforce section 287. Section 1846 simply is irrelevant to this case.

AFFIRMED.

BATCHELDER, Circuit Judge, dissenting.

I disagree with the majority's decision affirming the district court in granting summary judgment and injunctive relief for the plaintiffs. Therefore, I respectfully dissent from the Court's opinion.

I.

Defendants-Appellants present three central arguments in this appeal: (1) that Kentucky Revised Code § 287.030(4) ("section 287") is not preempted by 12 U.S.C. § 92 under traditional preemption analysis; (2) that the McCarran-Ferguson Act protects section 287 from preemption by § 92; and (3) that section 287 cannot be preempted by § 92 because of language contained in the Bank Holding Company Act (BHCA).

I agree with the majority's analysis of the first and third issues raised by the defendants. I respectfully disagree, however, with the majority's opinion on the issue of McCarran-Ferguson preemption. It is my belief that the McCarran-Ferguson Act does, in fact, shield the state statute, section 287, from preemption by the federal statute, § 92.

II.

As the majority accurately states, the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (referred to hereafter as § 2(b)), protects section 287 from preemption by § 92 if two

factors are satisfied. First, the state statute, section 287, much have been "enacted . . . for the purpose of regulating the business of insurance." McCarran-Ferguson § 2(b). Second, the federal statute, § 92, must *not* "specifically relate[] to the business of insurance." *Id.* If both of these requirements are met, the state statute will not be preempted by the federal statute.

In this case, I believe both factors have been satisfied. First, section 287 was clearly enacted by the Kentucky legislature to regulate the business of insurance. Second, § 92 does not specifically relate to the business of insurance.

A. McCarran-Ferguson

The McCarran-Ferguson Act was enacted by Congress in 1945 in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). In *South-Eastern Underwriters*, the Court held that regulation of interstate insurance activity was within the Commerce Clause power of Congress. *Id.* at 553. Congress responded adversely to the Court's decision, immediately enacting McCarran-Ferguson "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *Securities and Exchange Comm'n v. National Secs., Inc.*, 393 U.S. 453, 459 (1969).

Consistent with its view that the business of insurance is "'a local matter, to be subject to and regulated by the laws of the several States,'" Congress explicitly intended the McCarran-Ferguson Act to restore state taxing and regulatory powers over the insurance business to their pre-*South-Eastern Underwriters* scope. *Western and Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 654

(1981) (citing H.R.Rep. No. 143, 79th Cong., 1st Sess. 2 (1945)). Undeniably, the purpose of the McCarran-Ferguson Act was to "give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946).

Clearly, Article I, Section 8 of the United States Constitution grants Congress the power to regulate interstate commerce, including interstate insurance, if it so chooses. U.S. Const., Art. I, § 8, cl. 3; *see also South-Eastern Underwriters*, 322 U.S. at 539-45. It is nonetheless true that Congress may limit its own Commerce Clause power to grant the states "an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis v. BT Inv. Managers, Inc.* 447 U.S. 27, 44 (1980). The enactment of the McCarran-Ferguson Act represents such a situation in which, once the Supreme Court held that the regulation of interstate insurance was within Congress's commerce power, Congress exercised its plenary power by enacting McCarran-Ferguson to limit its own power by providing for regulation by the states instead.

B. Kentucky Section 287

Section 287.030(4) of the Kentucky Revised Code purports to prevent state or national banks from selling any insurance other than those narrow categories permitted by the statute. The applicable language of the statute reads:

(4) No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of real property mortgagee in mortgaged property, other than title insurance.

Ky. Rev. Stat. Ann. § 287.030 (Baldwin 1987). In a 1970 opinion, the Kentucky Attorney General determined that the provision applied to state banks as well as national banks doing business in Kentucky. Ky. Op. Att'y Gen. 70-643 (1970).

Defendants contend that section 287 "falls squarely" within § 2(b)'s requirement that a state statute be enacted to regulate the business of insurance to escape preemption by federal law. The district court found, to the contrary, that the Kentucky statute was not enacted to regulate the business of insurance. *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 36 (E.D. Ky. 1992). The district court's holding was based in part on the location of section 287 in the chapter of the Kentucky Revised Statutes regulating banks and trust companies. The lower court also based its decision on the three-part test set out in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). In its opinion, the majority also relied upon *Pireno* to determine what activities constitute the "business of insurance."

I respectfully disagree that the *Pireno* factors apply to this case. Rather, I believe that the defendants are correct that the Supreme Court's recent opinion in *United States Department of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), sets the controlling criteria in this case. *See also Colonial Life and Accident Ins. Co. v. American Family Life Assurance Co.*, 846 F. Supp. 454, 459 (D.S.C. 1994) ("while . . . the *Pireno* criteria are relevant in determining the applicability vel non of the antitrust exemption, they are not determinative with respect to the first clause of Section 2(b)").

C. *Fabe and the application of § 2(b)*

In *Fabe*, the Court held that an Ohio priority statute was saved from federal preemption to the extent that it regulated the relationship between an insurance company and its policyholders. *Fabe*, 113 S. Ct. at 2208. The Court, in its analysis, made an important distinction between the first and second clauses of § 2(b). According to the Court, the first clause deals with those state laws (such as section 287) enacted for the purpose of regulating insurance. The clause saves applicable state laws from federal preemption. The second clause, however, exempts from preemption "only 'the business of insurance' itself from the antitrust laws." *Fabe*, 113 S. Ct. at 2209 (quoting § 2(b) of McCarran-Ferguson) (emphasis added).

Thus, the *Fabe* Court explicitly distinguished the first clause of § 2(b) from the second clause, making it clear that the first clause "is not so narrowly circumscribed" as the second clause of § 2(b). *Id.* As the Court stated,

The language of 2(b) is unambiguous: the first clause commits laws "enacted . . . for the purpose of regulating the business of insurance" to the States, while the second clause exempts only "the business of insurance" itself from the antitrust laws. To equate laws "enacted . . . for the purpose of regulating the business of insurance" with the "business of insurance" itself, as petitioner urges us to do, would be to read words out of the statute. This we refuse to do.

Id. at 2209-10 (footnote omitted).

The Court further disputed the allegation that it was violating a "basic rule of statutory construction that identical

words used in different parts of the same act are intended to have the same meaning.'" *Fabe*, 113 S. Ct. at 2210 n. 6. According to the Court, "[t]his argument might be plausible if the two clauses actually employed identical language." *Id.* As the Court illustrated, however, the two clauses do not use identical language, rather "the first clause contains the word 'purpose,' a term that is significantly missing from the second clause." *Id.* Failure to distinguish the first clause of § 2(b) from the second clause therefore "overlooks another maxim of statutory construction: 'that a court should "give effect, if possible, to every clause and word of a statute."'" *Id.* (citations omitted). Therefore, the majority here cannot justify its failure to distinguish between the two parts of § 2(b) by "assur[ing]" us that the "business of insurance" has only one meaning. Maj. opinion at pp. 391-92.

Clearly, the first clause applies to a broader category of laws than the second clause. However the Court did more than "merely note" that the scope of the first and second clause of § 2(b) are "different," as the majority described the holding of *Fabe*. Maj. opinion at pp. 391-92. Rather, the *Fabe* Court described the first clause as applicable to "laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Id.* at 2210 (citation omitted). "This category necessarily encompasses more than just the 'business of insurance.'" *Id.*

Several prominent cases before *Fabe* dealt with the "business of insurance" within the meaning of the second clause of § 2(b). See *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982); *Group Life & Health Ins. Co. v. Royal*

Drug Co., 440 U.S. 205 (1979). A tripartite test¹ consequently developed out of these cases when the second clause of § 2(b) was at issue. The district court in the case at hand understandably relied on *Pireno's* tripartite test because *Fabe* had not yet been decided. In light of *Fabe*, however, I believe that both the district court's and the majority's reliance on *Pireno* is misplaced. For example, the majority relied on language from *Fabe* "that *Pireno* 'identified the three criteria . . . that are relevant in determining what activities constitute the 'business of insurance.'" Maj. opinion at p. 392 (quoting *Fabe*, 113 S. Ct. at 2208). However, this quotation appeared in the *Fabe* Court's presentation of the issues, before the Court actually analyzed *Pireno* and distinguished it from the Ohio statute then being considered. In its subsequent analysis of *Pireno*, the Court clearly limited the scope and application of *Pireno's* tripartite test stating: "*Pireno* and *Royal Drug* held only that 'ancillary activities' that do not affect performance of the insurance contract or enforcement of contractual obligations do not enjoy the antitrust exemption for laws regulating the 'business of insurance.'" *Fabe*, 113 S. Ct. at 2209 (quoting *Pireno*, 458 U.S. at 134 n. 8) (emphasis added). Furthermore, the Court distinguished the Ohio statute from *Pireno* stating that *Pireno* should "not [be] read . . . to suggest that the business of insurance is confined

¹Pursuant to *Pireno's* tripartite test, the "business of insurance" under the second clause of § 2(b), is determined by considering the following:

[F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Pireno, 458 U.S. at 129.

entirely to the writing of insurance contracts, as opposed to their performance." *Id.*

D. *McCarran-Ferguson Analysis—First Clause of 2(b)*

After the *Fabe* Court distinguished the first and second clauses of § 2(b) from one another, it further examined the history of McCarran-Ferguson to determine Congress's intent in drafting the first clause of § 2(b). Congress's reaction to the Supreme Court decision in *South-Eastern Underwriters* arose in part from its concern with the nature of the insurance contract. In enacting McCarran-Ferguson, Congress intended for the contract between an insurer and its policyholder to be controlled and regulated by the state. The legislation was aimed at:

The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the "business of insurance."

Securities and Exch. Comm'n v. National Secs., Inc., 393 U.S. 453, 460 (1969).

1. *Section 287: Enacted to Regulate the Business of Insurance*

The proper standard to apply, therefore, when determining whether the Kentucky statute at issue falls within the intended scope of McCarran-Ferguson, is to examine whether the statute is centrally concerned with policyholders. Defendants allege that section 287 was enacted to regulate the business of insurance. According to *Fabe*, this means the statute must have been enacted to protect or regulate the relationship between the insurer and the policyholder.

According to the majority, section 287 merely regulates a group of people which it intended to prevent from entering the insurance industry. Such exclusion of a person from participation in an activity is not viewed by the majority as regulation of the activity itself. I do not agree with this concept.

The only other federal court to address this issue recently examined a Florida statute that prevented insurance agents associated in any way with a financial institution from engaging in insurance agency activities. *Barnett Banks v. Gallagher*, 839 F. Supp. 835 (M.D. Fla. 1993). The Florida statute and section 287 therefore achieve the same goal—to prevent banks from selling general insurance—by slightly different means. Florida's statute restricted the activities of insurance agents while Kentucky's section 287 restricts the activities of bank holding companies. Like section 287, the Florida statute regulates a particular group of people by prohibiting them from entering the insurance industry. Unlike the majority in the case at hand, however, the court in *Barnett Banks* gauged the "larger intent" of the Florida statute and found the law was enacted to "'further[] the interests' of the potential policyholding public, [to] regulate[] the potential policyholding public and, therefore,

[was] a 'law enacted for the purpose of regulating the business of insurance' within the meaning of McCarran-Ferguson." *Barnett Banks*, 839 F. Supp. at 840-41 (quoting *Fabe* and § 2(b) of McCarran-Ferguson).

Even if the majority is correct in distinguishing statutes that regulate persons from those that regulate the manner in which an activity is conducted, it improperly fails to consider whether section 287 regulates the business of insurance indirectly. When Congress enacted the McCarran-Ferguson Act, it envisioned the "business of insurance" to focus upon those statutes "aimed at protecting or regulating [the relationship between insurer and policyholder], directly or indirectly" *National Secs.*, 393 U.S. at 460 (emphasis added). Therefore, it is sufficient for the Kentucky legislature to indirectly govern the relationship between an insurance company and future policyholders by enacting a statute such as section 287 to regulate those persons the state wishes to exclude from the insurance industry. See also *Hoylelake Inv. Ltd. v. Washburn*, 723 F. Supp. 42 (N.D. Ill. 1989) (finding that an Illinois statute regulated the policyholder relationship in part because of the state's concern for the future solvency of its insurance companies). Whether a state chooses to regulate its insurance industry by prohibiting particular persons, entities, activities, or conduct—directly or indirectly—is immaterial. If the state aims to protect or regulate the insurer/insured relationship, it is regulating the business of insurance. *National Secs.*, 393 U.S. at 460.

By enacting section 287, the Kentucky legislature likewise intended to protect and regulate the relationship between insurer and insured at its most basic level. In a 1981 Advisory Opinion the Kentucky Attorney General outlined the amendments which led to section 287 and stated that it was "the clear intent of the legislature to limit the

involvement of majority bank shareholders, including one-bank holding companies, in insurance related activities." Ky. Op. Att'y Gen. 81-173 (1981). Later, a Kentucky House Resolution stated: "if banks were licensed to sell homeowners, automobile, and other lines of insurance, the consumer could feel coerced into purchasing insurance from the bank to obtain the loan regardless of the insurance premium." Ky. H.R. 91-SS-BR-198 (1991). The legislature enacted the statute out of a direct concern for future policyholders. It cannot be disputed, therefore, that section 287 was aimed to protect the insurance relationship between insurers and policyholders.

Obviously, the Kentucky legislature was concerned that if banks, national or state, were able to sell general insurance to their customers, the banks could unduly influence those Kentucky citizens and jeopardize the ability to pay claims when demands were made. *See Barnett Banks*, 839 F. Supp. at 840. The state has an important interest in protecting its citizens by ensuring that insurance companies remain solvent. *Id.* In an effort to protect the interests of its citizens, the Kentucky legislature should not be so constrained that all legislation intended to regulate the insurance industry, "directly or indirectly," must be located only within its Insurance Code. *National Secs.*, 393 U.S. at 460.

The district court in the case at hand also was persuaded by plaintiffs' argument that section 287 does not regulate the business of insurance because it is not contained within Kentucky's Insurance Code, and is thus primarily intended to regulate bank holding companies rather than insurance. As the Supreme Court has said on this issue, however, "mere matters of form need not detain us." *Fabe*, 113 S. Ct. at 2210 (quoting *National Secs.* 393 U.S. at 460). It is not enough to state baldly that because the particular

statute does not fall directly within the Insurance Code, it does not regulate the business of insurance. "Instead, the Court must attempt to gauge the larger intent and design" of section 287. *Barnett Banks*, 839 F. Supp. at 840.

Accordingly, it is enough that a state undertakes to regulate insurance generally for a specific statute or practice to fall within the meaning of McCarran-Ferguson. *McIlhenny v. American Title Ins. Co.*, 418 F. Supp. 364, 369 (E.D. Pa. 1976). It is well-established that the McCarran-Ferguson Act's "state regulation" requirement is satisfied by the general undertaking by a state to regulate the insurance industry. *See Federal Trade Comm'n v. National Casualty Co.*, 357 U.S. 560 (1958); *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972). As illustrated by another circuit: "State power to regulate necessarily includes the discretion to prohibit, permit, or limit insurance practices as the state sees fit." *Dexter v. Equitable Life Assurance Soc'y*, 527 F.2d 233, 236 (2d Cir. 1975).

It is my opinion, therefore, that the district court erred in its holding. Contrary to the majority's opinion, I believe that section 287 was enacted to regulate the business of insurance.

2. Section 92: Not Specifically Related to the Business of Insurance

The second step in this McCarran-Ferguson analysis is to determine whether § 92 "specifically relates to the business of insurance." McCarran-Ferguson § 2(b). Because it decided that section 287 was not enacted to regulate the business of insurance, the majority declined to consider this issue. However, there is little doubt that, as the district court determined below, § 92 does *not*

specifically relate to the business of insurance. *Owensboro Nat'l Bank*, 803 F. Supp. at 34-35. Rather, § 92's "primary intent was to strengthen small national banks by providing them with an additional source of revenue." *Id.* (citations omitted). As the district court further stated, the mere fact that "the power granted to the national banks involves insurance does not transform this section into a regulation of the business of insurance." *Id.* at 36. On this issue, the district court's analysis is sound and should be followed by this Court.

The plaintiffs maintain, however, that § 92 does specifically regulate the business of insurance. The Supreme Court has not been explicitly clear how "specific" a federal statute must be to preempt a state law which regulates the business of insurance. The *Fabe* Court came the closest to a firm definition in determining that McCarran-Ferguson calls for a "clear statement rule." *Fabe*, 113 S. Ct. at 2211. According to this rule, a federal statute such as § 92 must "clearly state" that it regulates the business of insurance or otherwise intends to preempt a contrary state law. *Id.* Upon examining the legislative history of McCarran-Ferguson, the Court found that only when "Congress, in its wisdom, [acted] specifically with reference to insurance in enacting the law" would such a law preempt any state statute enacted to regulate the business of insurance. *Id.* at 2211 n.7. Therefore, "no existing law and no future law should, by mere implication, be applied to the business of insurance." *Id.* (quoting 91 Cong. Rec. 1487 (1945)).

The context of § 92 has always been within the regulation of banking rather than insurance. In *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America*, 113 S. Ct. 2173 (1993), in which the Court upheld the viability of § 92, the Court emphasized that § 92 was part of the Federal Reserve Act. *Id.* at 2182. The court in

Barnett Banks relied on the language of *Independent Ins. Agents* stating that § 92 was to be read in context with the other paragraphs around it and the fact that neither the *Independent Ins. Agents* Court nor Congress ever suggested that § 92 was specifically related to the business of insurance. Therefore, § 92 was found not to specifically relate to the business of insurance. *Barnett Banks*, 839 F. Supp. at 843.

Furthermore, no party has cited to any case in support of the contention that § 92 specifically relates to the business of insurance. The banks point to several cases in which other federal statutes were found to "specifically relate to the business of insurance" within the context of McCarran-Ferguson. None of these cases, however, is persuasive or applicable to the issue in this case. In *Hanover Ins. Co. v. Commissioner of Internal Revenue*, 598 F.2d 1211 (1st Cir.), *cert. denied*, 444 U.S. 915 (1979), the statute at issue was an Internal Revenue Service provision dealing exclusively with the taxation of insurance companies. Partially because of the exclusive insurance nature of the statute and partially because the power of federal taxation was not delegated to the states in this instance, *Hanover* is not persuasive here.

In *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *cert. denied*, 490 U.S. 1035 (1989), the statute at issue was the Longshore and Harbor Workers Compensation Act (LHWCA). Again, the Court in *Jackson* found overwhelming evidence within the language of the statute and its regulations to prove a pervasive regulation of the business of insurance. A similar pervasive intent to regulate the insurance business is not evident in § 92.

In *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978), an ERISA

provision was at issue. Once again, however, regulation of the business of insurance pervades ERISA. Not only have numerous courts agreed that ERISA specifically relates to the business of insurance, ERISA's "deemer" clause explicitly exempts state employee benefit plans from the preemption language of McCarran-Ferguson.

Finally, plaintiffs and an amicus brief from the American Bankers Association argue that if section 287 is found to regulate the business of insurance, then § 92 must also be found to specifically relate to the business of insurance. According to plaintiffs, common sense dictates that the definition of § 2(b)'s "business of insurance" be applied equally to both Kentucky's section 287 and § 92. The plaintiffs' argument is flawed, however, in its disregard for the exact wording of the statute. *See supra* subsection II.C. Section 2(b) states that a federal statute must "specifically relate[] to the business of insurance." Although this phrase is not clearly defined, the Court in *Fabe* termed it a "clear statement rule." *Fabe*, 113 S. Ct. at 2211. It is apparent from the *Fabe* decision that an analysis of the first clause of § 2(b) requires a broader standard for the state statute at issue than for the federal statute at issue. Furthermore, cases such as *Fabe* reach the very result contested by plaintiffs—that a state statute can be found to regulate the business of insurance without also finding that the federal statute specifically relates to the business of insurance.

III.

Consequently, I would find that McCarran-Ferguson prevents federal preemption of section 287 and I would reverse and remand on that basis.

No. 94-1837

Supreme Court, U.S.
FILED
JUL 5 1995

IN THE
Supreme Court of the United States
October Term, 1994

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,
v.

TOM GALLAGHER, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, *et al.*
Respondents.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Eleventh Circuit**
BRIEF IN OPPOSITION

DAVID J. BUSCH
(Counsel of Record)

DANIEL Y. SUMNER
General Counsel

FLORIDA DEPARTMENT OF INSURANCE
200 E. Gaines St.
Tallahassee, FL 32399-0307
(904) 413-4146

Attorneys for Respondents
Tom Gallagher and the
Florida Department of Insurance

LIST OF PARTIES

The names of all parties to the proceeding below appear in the Petitioner's caption of this case. Tom Gallagher is no longer State of Florida Treasurer and Insurance Commissioner. Bill Nelson now holds those offices.

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STATEMENT OF THE CASE

The statement of the case presented by Petitioner Barnett Bank of Marion County ("Barnett Bank" or "the bank") glosses over the trial testimony in this case. The result is a blurring of the differences between this case and *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994)(Pet. App. at 39a), which the bank cites to show "square conflict."

1. Factual Background

Barnett Bank purchased the insurance agency of Linda Clifford Insurance, Inc. and then sought a declaratory judgment from the United States District Court for the Middle District of Florida allowing it to market insurance to existing and potential customers, regardless of where located, from its branch office in the small town of Belleview, Florida. Barnett Bank sued Florida Insurance Commissioner Tom Gallagher and the Florida Department of Insurance (collectively "the Department") on the theory that 12 U.S.C. § 92 preempted sections 626.988(1)(a) and (2), Florida Statutes (1993). (Pet. at 3-5.)

The Department had issued an Immediate Final Order ("IFO"), directing Linda Clifford and her associate insurance agents ("LCI") to cease and desist from insurance agency activities other than the selling of credit life and credit disability insurance. Barnett Bank filed a motion for a temporary restraining order in the District Court seeking to enjoin the Department from enforcing the IFO.

2. District Court Proceedings

The District Court denied the motion for a temporary restraining order and set a bench trial.

Barnett Bank, in a pretrial memorandum, argued that Florida had placed a "precatory gloss" on Florida Statutes section 626.988 "by attaching labels and proffering expert testimony" designed to leave a false impression that the Florida law was a piece of consumer protection legislation. The Department responded by arguing that Barnett Bank's attack on the underlying purposes of section 626.988 raised a significant factual issue as to the purposes of the statute, which determination was essential to a proper resolution of the central preemption issue.

Aside from a joint stipulation filed by the parties, the only testimony introduced at trial was by the Department, the bank's position being: "We don't have any testimony to put on."

A. Joint Stipulation

The parties filed a stipulation containing the following pertinent facts. Barnett Bank of Marion County is a national banking association organized under the National Bank Act and a wholly-owned subsidiary of Barnett Banks, Inc., the largest bank holding company headquartered in Florida and one of the largest bank holding companies in the Southeastern United States. The bank maintains its principal place of business in Ocala, Florida, has a branch located in nearby Belleview, and engages in banking primarily in Marion County, Florida. Belleview, Florida has a population of less than 5,000, as shown by the 1990 decennial census.

At the time of its purchase by the bank, LCI was a general, all-lines insurance agency, which had expanded

its customer base beyond the town of Belleview, and Marion County. The scope of its operations was limited only by the insurance needs of its customers. LCI policyholders are located in 28 Florida counties and 15 other states.

When Barnett Banks purchased LCI, the Florida licensed insurance agents of LCI became employees of the bank. Before the Department entered its IFO, the bank-owned insurance agency operated as the insurance division of the Belleview branch of Barnett Bank and acted as a general lines agent for insurance companies authorized by the State of Florida to do business in Florida. It is Barnett Bank's intention to market insurance to existing and potential customers, wherever located, from the "less than 5,000" place of Belleview, Florida.

B. Testimony at Trial

The only testimony presented to the trial court was presented by the Department through Donald A. Dowdell and Douglas A. Shropshire, two state officials most familiar with Florida Statutes section 626.988 and Florida's twenty-year enforcement experience with that statute.

Florida's Insurance Code regulates the transaction of insurance for the purpose of protecting policyholders while ensuring the availability and affordability of coverage by solvent insurance companies. Section 626.988, part of the Unfair and Deceptive Trade Practices Act within the Florida Insurance Code, prohibits insurance agents from transacting, selling, soliciting, or servicing insurance while associated with, controlled by or employed by, financial institutions.

The purposes of section 626.988 include: first, preventing coercion of insurance consumers through the express or implied force of credit; secondly, preventing the concentration of

economic resources; and thirdly, preventing unfair trade practices in the transaction of insurance. These three purposes can be found in the legislative history of the statute, caselaw, and from the Department's experience in administering section 626.988 and related provisions.

The Department's experience has shown that these three concerns, acknowledged as valid by the courts in *Glendale Fed. Sav. & Loan Ass'n v. Dep't of Ins.*, 587 So. 2d 534, 536 (Fla. 1st DCA 1991), *rev. denied*, 599 So. 2d 565 (Fla. 1992), and *Production Credit Ass'n of Fla. v. Dep't of Ins.*, 356 So. 2d 31 (Fla. 1st DCA 1978), are "real concerns." Mr. Shropshire testified, "yes, we absolutely found all three of those elements to be present dangers to policyholders and to the solvency of the company...."

Addressing each concern individually, the unrebutted testimony established that the problem of the inherent coercive power of credit is well recognized. Bank customers seeking, for example, an auto loan or home mortgage are steered to insurance products offered by the bank or through an insurance agency operating in association with the bank. The granting of the loan is then directly or indirectly tied to the purchase of insurance.

Secondly, as to preventing the concentration of economic resources, the Department's experience has shown that certain third party interests who have access to large customer bases and the huge premium writings generated thereby, possess sufficient leverage to dictate financial decisions to insurers to such an extent that insurers have become insolvent as a result thereof.

This problem is not unique to agents operating in association with financial institutions. Similar concerns are addressed by Florida's producer-controlled insurer statute, the managing general agent law, and the holding company statute. All of these business relationships may lead to the

problem of "reverse competition," whereby vendors and lenders controlling large blocks of business dictate commission pricing to insurers dependent on that cash flow. Instead of commission levels being driven by standard free-market pricing, insurers "leapfrog" each other, offering progressively higher commission levels to producers of large blocks of business.

Florida's experience with credit life insurance, a product marketed through financial institutions and exempted from the prohibitions of section 626.988, shows actual commission levels of eighty percent, leaving only twenty percent for the payment of claims. By way of comparison, health insurance and property and casualty insurance loss ratios are typically the exact opposite — administrative expenses are around thirty percent, leaving approximately seventy percent of premium dollars to pay claims. While section 626.988 has generally served to limit such abuses by financial institutions in the marketing of insurance, the notable exceptions to the prohibitions of section 626.988, credit life and credit disability insurance, are where Florida has encountered problems.

Thirdly, as to preventing unfair trade practices, the unrebutted testimony established that recent Department investigations revealed extensive evidence of intentional business arrangements whereby banks had sought to mislead policyholders and prospective policyholders as to the product and the bank's relationship to the product. The product would be "dressed up" to appear as a bank investment when in reality the product was insurance sold by an independent and unrelated insurance agency. Florida's elderly population is particularly susceptible to being thus misled.

In addition to these three problem areas, Florida's insurance licensure process requires a minimum number of class hours, an examination, and a clean police record for

individuals to be licensed to sell insurance products. Department investigations revealed that when banks operate contrary to section 626.988, it is not uncommon to find the bank utilizing its staff to solicit and to talk to prospective policyholders about insurance products. Section 626.988 prevents such unlicensed activities.

C. The District Court's Ruling

Five of the eighteen pages of the district court's order (Pet. App. at 26a-31a), are devoted to answering the following inquiry:

Under McCarran-Ferguson, then, the Court's initial inquiry must be to determine whether section 626.988 is a law enacted by the State of Florida "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

(Pet. App. at 26a.) The McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, insulates state laws from challenges of preemption under the Supremacy Clause where state laws are enacted for the purpose of regulating the business of insurance. Relying upon trial testimony set forth above and this Court's decisions in *United States Dep't of Treasury v. Fabe*, ___ U.S. ___, 113 S. Ct. 2202 (1993) and *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453 (1969), the district court found that section 626.988 is a law enacted by the State of Florida for the purpose of regulating the business of insurance.

The district court found the State's concerns to be legitimate in that the statute indirectly protects the relationship between insurer and insured by protecting the insurance purchasing public. The court held the law "furthers the interest" of the potential policyholding public, and therefore, is a "law enacted for the purpose of regulating the business

of insurance" within the meaning of McCarran-Ferguson. *Fabe*, 113 S. Ct. at 2208.

After concluding from the evidence that section 626.988 is a law enacted for the purpose of regulating insurance (the second question presented in the Petition), the trial court addressed the third question presented in the Petition, "Whether 12 U.S.C. § 92 is an 'Act [that] specifically relates to the business of insurance' within the meaning of the McCarran-Ferguson Act." The court first noted that the bank "has consistently stated and/or conceded that § 92 is a 'bank' law, and has premised its argument accordingly." (Pet. App. at 25a, n.3.) Relying upon *Fabe*, the court then looked to whether § 92 "specifically requires" that a conflicting state statute yield. (Pet. App. at 32a.) Contrasting the facts in this case with those in *Owensboro*, the court concluded "that § 92 neither 'specifically relates to the business of insurance,' 15 U.S.C. § 1012(b), nor 'specifically requires,' *Fabe*, ___ U.S. ___, 113 S. Ct. at 2211, that apparently conflicting state laws be preempted." (Pet. App. at 35a.)

Finding Florida's statute saved from preemption as a result of the McCarran-Ferguson Act, the district court entered an opinion and order denying Barnett Marion injunctive and declaratory relief.

3. The Eleventh Circuit's Ruling

The Eleventh Circuit affirmed after reviewing the district court's fact findings for clear error, notwithstanding "none of the parties allege[d] the trial court erred in its fact-finding" (Pet. App. at 7a.) Accepting the uncontradicted evidence that section 626.988 was for the protection of Florida policyholders, the Eleventh Circuit applied this Court's "relationship" test in *Fabe*, as taken "directly from" *SEC v. Nat'l Sec., Inc.*, 393 U.S. at 460 (Pet. App. at 10a.) Relying on the state court interpretations, testimony at trial, reference in

the Florida statute to McCarran-Ferguson, and explicit instruction from the United States Supreme Court in *Nat'l Securities*, the Eleventh Circuit found that section 626.988 regulates the business of insurance because it protects policyholders. (Pet. App. at 12a-13a.) The 11th Circuit then reviewed § 92 and concluded that § 92, "neither 'specifically relates to the business of insurance,' 15 U.S.C. § 1012(b), nor 'specifically requires' that apparently conflicting state laws be preempted." (Pet. App. at 15a.) "Under the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interest of policyholders." *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2208. (Pet. App. at 13a.)

Barnett Bank complains that the Eleventh Circuit "ignor[ed] the contrary decision of the Sixth Circuit in *Owensboro*" in affirming the district court order. While the Eleventh Circuit did not cite *Owensboro*, the district court did and distinguished it factually and legally. (Pet. App. at 34a, n.5.)

REASONS FOR DENYING THE WRIT

1. There Is No Conflict between the Circuits

Contrary to Petitioner's claim, the Sixth Circuit decision in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994)(Pet. App. at 37a *et seq.*), does not conflict with this case. Three courts have found *Owensboro*, and the Kentucky statute at issue in that matter, to be factually and legally distinguishable from this case. *Barnett Bank of Marion Cty. v. Gallagher*, 839 F. Supp. 835 (M.D. Fla. 1993), *affirmed*, 43 F.3d 631, 636 (11th Cir. 1995)(Pet. App. at 1a, 17a); *First Advantage Ins. Inc. v. Green*, 652 So. 2d 562 (La. Ct. App.), *writ denied*, ___ So. 2d ___ (La. 1995).

First, the Kentucky statute only prohibits insurance sales by persons who own a majority interest in the financial institution. A bank with fractured ownership which lacks a majority shareholder is free to sell insurance to its customers as is a person who owns less than a majority interest. Florida's statute prohibits insurance agents who are associated with a bank from engaging in insurance activities. Fla. Stat. § 626.988(2); (Pet. at 5.) Florida's statute is materially different from Kentucky's statute and provides prospective policyholders greater protection from unfair trade practices (e.g., coercion, reverse competition) than Kentucky's statute.

In addition, unlike the Florida statute, the Kentucky statute is located squarely within a statutory chapter regulating *banks and trust companies*, not insurance. Located within Florida's Unfair Insurance Trade Practices Act of its Insurance Code, Florida's statute applies, with certain minor exceptions, to *all* insurance activity by agents employed by or associated with financial institutions. Although the location of a statute is not determinative under McCarran-Ferguson, it does provide insight as to the purpose of the statute. *Barnett* (Pet. App. at 9a), *citing Fabe*.

Third, no evidence was introduced at trial in *Owensboro* to establish that the purpose of Kentucky's statute is to regulate insurance. There was no trial. Rather, the case was decided by the district court on summary judgment, "there being no genuine issue as to any material fact." *Rule 56(c)*, Fed. R. Civ. Proc. Unlike the district court in Florida, the *Owensboro* district court was not cited a single Kentucky case that explained the purpose of Kentucky's statute. Opinions from Kentucky's attorney general indicate that the Kentucky statute was enacted to regulate bank holding companies, and, by interpretation, their bank subsidiaries. 803 F. Supp. at 35. The purpose of Florida's statute, by contrast, is clearly to prevent policyholders and potential policyholders from being coerced or otherwise subjected to unfair trade practices. Contrary to Barnett Bank's arguments below, Florida's statute was not passed with "the identical purpose, intent, and effect as the Kentucky statute."

Contrary to Petitioner's implied assertion, similar prohibitions might be passed for a variety of reasons beyond the two found in *Owensboro* and *Barnett*. Such reasons could include prohibiting banks from engaging in risky lines of business such as insurance brokerage or prohibiting banks from competing against their depositors. Each state statute must be examined independently to determine its legislative purpose. In Florida, with its elderly population, the State has a heightened concern as to unfair trade practices.

Beyond the bank's bald assertions of a purpose other than that provided by caselaw, testimony, and legislative history, The bank has not presented any evidence that would establish that the underlying purposes of section 626.988 are different from those found below or analogous to the purpose determined by the Sixth Circuit majority in *Owensboro* for Kentucky's statute. Because a determination under McCarran-Ferguson necessarily depends upon the

underlying purpose of a state's legislation, there can be no "square conflict of circuits on the legal issues." (Pet. at 10.)

Finally, as to Question 3, whether 12 U.S.C. § 92 is an Act that "specifically relates" to the business of insurance within the meaning of the McCarran-Ferguson Act, the *Owensboro* circuit court majority declined to consider the question. (Pet. App. at 49a.) Therefore, there is no conflict between the circuits as to that issue. But the district court in *Owensboro* did address the issue, stating "it seems fairly obvious that § 92 does not constitute Congressional regulation of that [insurance] business." *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 36 (E.D. Ky. 1992). Similarly, the dissent in *Owensboro* found, "[T]here is little doubt that, as the district court determined below, § 92 does not specifically relate to the business of insurance." *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 397 (6th Cir. 1994)(Batchelder, J., dissenting)(Pet. App. at 61a-62a.) As to this question, there is no conflict between circuits.

In passing, Petitioners also assert that the decision conflicts with *United Services Auto Ass'n v. Muir*, 792 F.2d 356 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). In *Muir*, the court found the purpose of the statute was not to protect policyholders, but to "prevent competition between insurers and Pennsylvania financial institutions." *Muir*, 792 F.2d at 364. Pennsylvania's statute, like Kentucky's, is different in character and function.

For these reasons, there is no square conflict between the circuits requiring this Court to grant the petition for certiorari in this matter. At best, the circuit courts are applying complicated legal principles to differing factual circumstances and arriving at a conclusion with which Petitioner simply disagrees.

2. There Is No "National Uncertainty" of "Great Practical Importance"

Because two circuits have reached different results on different facts does not establish "national uncertainty" of "great practical importance." The courts are applying this Court's "relationship" test as stated in *Fabe*, taken "directly from" *SEC v. Nat'l Sec., Inc.*, 393 U.S. at 460 (Pet. App. at 10a.) One should expect different results as each state's insurance statutes are put to the same test.

In support of its statement that there now exists great national uncertainty, Barnett argues that as many as fifteen states have "laws purporting to restrict the ability of national banks to sell insurance within the State's borders." (Pet. at 6, n.1.) One such state, however, has reviewed its law and determined that its statute was not preempted. *First Advantage*, 652 So. 2d at 562. Relying upon the analyses used in *Owensboro* and *Barnett*, Louisiana's Court of Appeal found the state's law protects policyholders "directly or indirectly," *Nat'l Sec.*, 393 U.S. at 460, and is saved from preemption by McCarran-Ferguson.

First Advantage shows that courts are applying the principles set forth by this Court's precedents, along with the analyses in *Owensboro* and *Barnett*, to the statutes before them and arriving at fair and reasoned decisions based upon factual determinations of each statute's purpose. Because a statute may be enacted for different purposes, surely different conclusions will be obtained when the statutes are put to the same *Fabe/National Securities* test. Uniform application of these legal principles, always a goal unrealized, will properly evoke differing results on different facts.

3. The Eleventh Circuit's Decision Is Correct

"The two halves of the Eleventh Circuit's analysis manifestly do not fit together" declares the bank. (Pet. App. at 16.) That is because there are not two halves to the Eleventh Circuit's analysis. There are two analyses. Each is independent of the other. To confuse the two is to risk misleading this Court.

The first analysis requires a fact-intensive determination of the *purpose* of the Florida law, applying the *Fabe/National Securities* test. Questions as to whether the Florida's statute protects or regulates policyholders' interests, directly or indirectly, were answered by witnesses, caselaw, and legislative history. See *Glendale*, 584 So. 2d 534, and *Production Credit*, 356 So.2d 31. That evidence was reviewed and accepted *in toto* under the plain error standard for factual determinations, although no such error was even alleged to have occurred. The McCarran-Ferguson Act, *Fabe* and *National Securities* were then applied to those facts to determine that section 626.988 is a law possessing the " 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Fabe*, 133 S. Ct. at 2210. See also *Robertson v. California*, 328 U.S. 440 (1946) (licensure and regulation of insurance agents within the state's historic regulation of insurance).

Having determined that the state law was enacted for the purpose of regulating the business of insurance, the Eleventh Circuit proceeded to the second analysis. A second distinct analysis was required because this Court has stated that "State laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *Fabe*, __ U.S. __, 113 S. Ct. at 2211. In the words of the unanimous Eleventh Circuit Court: "To answer this

question, we examine the section's history." *Barnett Bank* 43 F.3d at 636. (Pet. App. at 13a.) No "specific requirement" was found after an exhaustive parsing of this Court's controlling opinions. *Id.* at 636-637. (Pet. App. at 13a-15a.) What was "obvious" to the lower *Owensboro* Court, not addressed by the *Owensboro* Circuit Court majority, deemed a matter of "little doubt" by the *Owensboro* Circuit Court dissenter, and not even argued by *Barnett Bank* at trial below, was that: "Congress could not have been attempting to regulate a business that it believed it had no power to regulate. Congress was concerned with banking, not insurance." *Barnett Bank*, 43 F.3d at 637. (Pet. App. at 15a.)

Those two analyses are consistent and compatible; they fit together perfectly. It is misleading for Petitioner to suggest that one analysis of the McCarran-Ferguson test is "narrower" than the other. Because McCarran-Ferguson governs the interplay of federal and state governments in the regulation of insurance, different policy objectives govern construction of the different terms used in McCarran-Ferguson. In *Fabe*, for example, this Court applied a "clear statement" rule to determine whether a federal statute "relates to the business of insurance." But in determining whether a state statute "regulates" the business of insurance, this Court looked to whether the underlying purpose of the state statute was protection of policyholders.

Each part of McCarran-Ferguson's test must be independently applied, one to the state statute, the other to the federal statute, to determine whether each fits within the intent of McCarran-Ferguson. The Eleventh Circuit correctly applied each analysis to the state and federal statutes at issue, in accordance with this Court's precedents.

4. This Case Is Not An Appropriate Subject for A Writ of Certiorari

The bank argues that because of conflict between this case and *Owensboro*, this case is an appropriate subject for a writ of certiorari. For the reasons set forth above, there is no direct conflict between the circuits in *Barnett* and *Owensboro*. *Barnett* was properly decided. There is no basis for issuing a writ.

5. Comptroller Did Not Intervene Below

The Comptroller of the Currency intervened in the *Owensboro* case in support of the banking interests, whereas in this case, as Petitioner notes (Pet. at 15), the Comptroller simply "voiced concern" by filing an amicus brief in the Eleventh Circuit Court. The Comptroller's filing of an amicus brief below should not substantially influence this Court's decision as to whether to issue a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

DAVID J. BUSCH

Counsel of Record

DANIEL Y. SUMNER

General Counsel

FLORIDA DEPARTMENT OF INSURANCE

200 E. Gaines Street, Suite 645A

Tallahassee, FL 32399-0307

(904) 413-4146

Attorneys for Respondents

Tom Gallagher and the

Florida Department of Insurance

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Petitioner,

v.

TOM GALLAGHER, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, *et al.*
Respondents.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Eleventh Circuit**
BRIEF IN OPPOSITION

DAVID J. BUSCH
(Counsel of Record)

DANIEL Y. SUMNER
General Counsel

FLORIDA DEPARTMENT OF INSURANCE
200 E. Gaines St.
Tallahassee, FL 32399-0307
(904) 413-4146

Attorneys for Respondents
Tom Gallagher and the
Florida Department of Insurance

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2009

LIST OF PARTIES

The names of all parties to the proceeding below appear in the Petitioner's caption of this case. Tom Gallagher is no longer State of Florida Treasurer and Insurance Commissioner. Bill Nelson now holds those offices.

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STATEMENT OF THE CASE

The statement of the case presented by Petitioner Barnett Bank of Marion County ("Barnett Bank" or "the bank") glosses over the trial testimony in this case. The result is a blurring of the differences between this case and *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994)(Pet. App. at 39a), which the bank cites to show "square conflict."

1. Factual Background

Barnett Bank purchased the insurance agency of Linda Clifford Insurance, Inc. and then sought a declaratory judgment from the United States District Court for the Middle District of Florida allowing it to market insurance to existing and potential customers, regardless of where located, from its branch office in the small town of Belleview, Florida. Barnett Bank sued Florida Insurance Commissioner Tom Gallagher and the Florida Department of Insurance (collectively "the Department") on the theory that 12 U.S.C. § 92 preempted sections 626.988(1)(a) and (2), Florida Statutes (1993). (Pet. at 3-5.)

The Department had issued an Immediate Final Order ("IFO"), directing Linda Clifford and her associate insurance agents ("LCI") to cease and desist from insurance agency activities other than the selling of credit life and credit disability insurance. Barnett Bank filed a motion for a temporary restraining order in the District Court seeking to enjoin the Department from enforcing the IFO.

2. District Court Proceedings

The District Court denied the motion for a temporary restraining order and set a bench trial.

Barnett Bank, in a pretrial memorandum, argued that Florida had placed a "precatory gloss" on Florida Statutes section 626.988 "by attaching labels and proffering expert testimony" designed to leave a false impression that the Florida law was a piece of consumer protection legislation. The Department responded by arguing that Barnett Bank's attack on the underlying purposes of section 626.988 raised a significant factual issue as to the purposes of the statute, which determination was essential to a proper resolution of the central preemption issue.

Aside from a joint stipulation filed by the parties, the only testimony introduced at trial was by the Department, the bank's position being: "We don't have any testimony to put on."

A. Joint Stipulation

The parties filed a stipulation containing the following pertinent facts. Barnett Bank of Marion County is a national banking association organized under the National Bank Act and a wholly-owned subsidiary of Barnett Banks, Inc., the largest bank holding company headquartered in Florida and one of the largest bank holding companies in the Southeastern United States. The bank maintains its principal place of business in Ocala, Florida, has a branch located in nearby Belleview, and engages in banking primarily in Marion County, Florida. Belleview, Florida has a population of less than 5,000, as shown by the 1990 decennial census.

At the time of its purchase by the bank, LCI was a general, all-lines insurance agency, which had expanded

its customer base beyond the town of Belleview, and Marion County. The scope of its operations was limited only by the insurance needs of its customers. LCI policyholders are located in 28 Florida counties and 15 other states.

When Barnett Banks purchased LCI, the Florida licensed insurance agents of LCI became employees of the bank. Before the Department entered its IFO, the bank-owned insurance agency operated as the insurance division of the Belleview branch of Barnett Bank and acted as a general lines agent for insurance companies authorized by the State of Florida to do business in Florida. It is Barnett Bank's intention to market insurance to existing and potential customers, wherever located, from the "less than 5,000" place of Belleview, Florida.

B. Testimony at Trial

The only testimony presented to the trial court was presented by the Department through Donald A. Dowdell and Douglas A. Shropshire, two state officials most familiar with Florida Statutes section 626.988 and Florida's twenty-year enforcement experience with that statute.

Florida's Insurance Code regulates the transaction of insurance for the purpose of protecting policyholders while ensuring the availability and affordability of coverage by solvent insurance companies. Section 626.988, part of the Unfair and Deceptive Trade Practices Act within the Florida Insurance Code, prohibits insurance agents from transacting, selling, soliciting, or servicing insurance while associated with, controlled by or employed by, financial institutions.

The purposes of section 626.988 include: first, preventing coercion of insurance consumers through the express or implied force of credit; secondly, preventing the concentration of

economic resources; and thirdly, preventing unfair trade practices in the transaction of insurance. These three purposes can be found in the legislative history of the statute, caselaw, and from the Department's experience in administering section 626.988 and related provisions.

The Department's experience has shown that these three concerns, acknowledged as valid by the courts in *Glendale Fed. Sav. & Loan Ass'n v. Dep't of Ins.*, 587 So. 2d 534, 536 (Fla. 1st DCA 1991), *rev. denied*, 599 So. 2d 565 (Fla. 1992), and *Production Credit Ass'n of Fla. v. Dep't of Ins.*, 356 So. 2d 31 (Fla. 1st DCA 1978), are "real concerns." Mr. Shropshire testified, "yes, we absolutely found all three of those elements to be present dangers to policyholders and to the solvency of the company...."

Addressing each concern individually, the unrebutted testimony established that the problem of the inherent coercive power of credit is well recognized. Bank customers seeking, for example, an auto loan or home mortgage are steered to insurance products offered by the bank or through an insurance agency operating in association with the bank. The granting of the loan is then directly or indirectly tied to the purchase of insurance.

Secondly, as to preventing the concentration of economic resources, the Department's experience has shown that certain third party interests who have access to large customer bases and the huge premium writings generated thereby, possess sufficient leverage to dictate financial decisions to insurers to such an extent that insurers have become insolvent as a result thereof.

This problem is not unique to agents operating in association with financial institutions. Similar concerns are addressed by Florida's producer-controlled insurer statute, the managing general agent law, and the holding company statute. All of these business relationships may lead to the

problem of "reverse competition," whereby vendors and lenders controlling large blocks of business dictate commission pricing to insurers dependent on that cash flow. Instead of commission levels being driven by standard free-market pricing, insurers "leapfrog" each other, offering progressively higher commission levels to producers of large blocks of business.

Florida's experience with credit life insurance, a product marketed through financial institutions and exempted from the prohibitions of section 626.988, shows actual commission levels of eighty percent, leaving only twenty percent for the payment of claims. By way of comparison, health insurance and property and casualty insurance loss ratios are typically the exact opposite — administrative expenses are around thirty percent, leaving approximately seventy percent of premium dollars to pay claims. While section 626.988 has generally served to limit such abuses by financial institutions in the marketing of insurance, the notable exceptions to the prohibitions of section 626.988, credit life and credit disability insurance, are where Florida has encountered problems.

Thirdly, as to preventing unfair trade practices, the unrebutted testimony established that recent Department investigations revealed extensive evidence of intentional business arrangements whereby banks had sought to mislead policyholders and prospective policyholders as to the product and the bank's relationship to the product. The product would be "dressed up" to appear as a bank investment when in reality the product was insurance sold by an independent and unrelated insurance agency. Florida's elderly population is particularly susceptible to being thus misled.

In addition to these three problem areas, Florida's insurance licensure process requires a minimum number of class hours, an examination, and a clean police record for

individuals to be licensed to sell insurance products. Department investigations revealed that when banks operate contrary to section 626.988, it is not uncommon to find the bank utilizing its staff to solicit and to talk to prospective policyholders about insurance products. Section 626.988 prevents such unlicensed activities.

C. The District Court's Ruling

Five of the eighteen pages of the district court's order (Pet. App. at 26a-31a), are devoted to answering the following inquiry:

Under McCarran-Ferguson, then, the Court's initial inquiry must be to determine whether section 626.988 is a law enacted by the State of Florida "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

(Pet. App. at 26a.) The McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, insulates state laws from challenges of preemption under the Supremacy Clause where state laws are enacted for the purpose of regulating the business of insurance. Relying upon trial testimony set forth above and this Court's decisions in *United States Dep't of Treasury v. Fabe*, ___ U.S. ___, 113 S. Ct. 2202 (1993) and *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453 (1969), the district court found that section 626.988 is a law enacted by the State of Florida for the purpose of regulating the business of insurance.

The district court found the State's concerns to be legitimate in that the statute indirectly protects the relationship between insurer and insured by protecting the insurance purchasing public. The court held the law "furthers the interest" of the potential policyholding public, and therefore, is a "law enacted for the purpose of regulating the business

of insurance" within the meaning of McCarran-Ferguson. *Fabe*, 113 S. Ct. at 2208.

After concluding from the evidence that section 626.988 is a law enacted for the purpose of regulating insurance (the second question presented in the Petition), the trial court addressed the third question presented in the Petition, "Whether 12 U.S.C. § 92 is an 'Act [that] specifically relates to the business of insurance' within the meaning of the McCarran-Ferguson Act." The court first noted that the bank "has consistently stated and/or conceded that § 92 is a 'bank' law, and has premised its argument accordingly." (Pet. App. at 25a, n.3.) Relying upon *Fabe*, the court then looked to whether § 92 "specifically requires" that a conflicting state statute yield. (Pet. App. at 32a.) Contrasting the facts in this case with those in *Owensboro*, the court concluded "that § 92 neither 'specifically relates to the business of insurance,' 15 U.S.C. § 1012(b), nor 'specifically requires,' *Fabe*, ___ U.S. ___, 113 S. Ct. at 2211, that apparently conflicting state laws be preempted." (Pet. App. at 35a.)

Finding Florida's statute saved from preemption as a result of the McCarran-Ferguson Act, the district court entered an opinion and order denying Barnett Marion injunctive and declaratory relief.

3. The Eleventh Circuit's Ruling

The Eleventh Circuit affirmed after reviewing the district court's fact findings for clear error, notwithstanding "none of the parties allege[d] the trial court erred in its fact-finding" (Pet. App. at 7a.) Accepting the uncontradicted evidence that section 626.988 was for the protection of Florida policyholders, the Eleventh Circuit applied this Court's "relationship" test in *Fabe*, as taken "directly from" *SEC v. Nat'l Sec., Inc.*, 393 U.S. at 460 (Pet. App. at 10a.) Relying on the state court interpretations, testimony at trial, reference in

the Florida statute to McCarran-Ferguson, and explicit instruction from the United States Supreme Court in *Nat'l Securities*, the Eleventh Circuit found that section 626.988 regulates the business of insurance because it protects policyholders. (Pet. App. at 12a-13a.) The 11th Circuit then reviewed § 92 and concluded that § 92, "neither 'specifically relates to the business of insurance,' 15 U.S.C. § 1012(b), nor 'specifically requires' that apparently conflicting state laws be preempted." (Pet. App. at 15a.) "Under the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interest of policyholders." *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2208. (Pet. App. at 13a.)

Barnett Bank complains that the Eleventh Circuit "ignor[ed] the contrary decision of the Sixth Circuit in *Owensboro*" in affirming the district court order. While the Eleventh Circuit did not cite *Owensboro*, the district court did and distinguished it factually and legally. (Pet. App. at 34a, n.5.)

REASONS FOR DENYING THE WRIT

1. There Is No Conflict between the Circuits

Contrary to Petitioner's claim, the Sixth Circuit decision in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994)(Pet. App. at 37a *et seq.*), does not conflict with this case. Three courts have found *Owensboro*, and the Kentucky statute at issue in that matter, to be factually and legally distinguishable from this case. *Barnett Bank of Marion Cty. v. Gallagher*, 839 F. Supp. 835 (M.D. Fla. 1993), *affirmed*, 43 F.3d 631, 636 (11th Cir. 1995)(Pet. App. at 1a, 17a); *First Advantage Ins. Inc. v. Green*, 652 So. 2d 562 (La. Ct. App.), *writ denied*, ___ So. 2d ___ (La. 1995).

First, the Kentucky statute only prohibits insurance sales by persons who own a majority interest in the financial institution. A bank with fractured ownership which lacks a majority shareholder is free to sell insurance to its customers as is a person who owns less than a majority interest. Florida's statute prohibits insurance agents who are associated with a bank from engaging in insurance activities. Fla. Stat. § 626.988(2); (Pet. at 5.) Florida's statute is materially different from Kentucky's statute and provides prospective policyholders greater protection from unfair trade practices (e.g., coercion, reverse competition) than Kentucky's statute.

In addition, unlike the Florida statute, the Kentucky statute is located squarely within a statutory chapter regulating *banks and trust companies*, not insurance. Located within Florida's Unfair Insurance Trade Practices Act of its Insurance Code, Florida's statute applies, with certain minor exceptions, to *all* insurance activity by agents employed by or associated with financial institutions. Although the location of a statute is not determinative under McCarran-Ferguson, it does provide insight as to the purpose of the statute. *Barnett* (Pet. App. at 9a), *citing Fabe*.

Third, no evidence was introduced at trial in *Owensboro* to establish that the purpose of Kentucky's statute is to regulate insurance. There was no trial. Rather, the case was decided by the district court on summary judgment, "there being no genuine issue as to any material fact." *Rule 56(c)*, Fed. R. Civ. Proc. Unlike the district court in Florida, the *Owensboro* district court was not cited a single Kentucky case that explained the purpose of Kentucky's statute. Opinions from Kentucky's attorney general indicate that the Kentucky statute was enacted to regulate bank holding companies, and, by interpretation, their bank subsidiaries. 803 F. Supp. at 35. The purpose of Florida's statute, by contrast, is clearly to prevent policyholders and potential policyholders from being coerced or otherwise subjected to unfair trade practices. Contrary to Barnett Bank's arguments below, Florida's statute was not passed with "the identical purpose, intent, and effect as the Kentucky statute."

Contrary to Petitioner's implied assertion, similar prohibitions might be passed for a variety of reasons beyond the two found in *Owensboro* and *Barnett*. Such reasons could include prohibiting banks from engaging in risky lines of business such as insurance brokerage or prohibiting banks from competing against their depositors. Each state statute must be examined independently to determine its legislative purpose. In Florida, with its elderly population, the State has a heightened concern as to unfair trade practices.

Beyond the bank's bald assertions of a purpose other than that provided by caselaw, testimony, and legislative history, The bank has not presented any evidence that would establish that the underlying purposes of section 626.988 are different from those found below or analogous to the purpose determined by the Sixth Circuit majority in *Owensboro* for Kentucky's statute. Because a determination under McCarran-Ferguson necessarily depends upon the

underlying purpose of a state's legislation, there can be no "square conflict of circuits on the legal issues." (Pet. at 10.)

Finally, as to Question 3, whether 12 U.S.C. § 92 is an Act that "specifically relates" to the business of insurance within the meaning of the McCarran-Ferguson Act, the *Owensboro* circuit court majority declined to consider the question. (Pet. App. at 49a.) Therefore, there is no conflict between the circuits as to that issue. But the district court in *Owensboro* did address the issue, stating "it seems fairly obvious that § 92 does not constitute Congressional regulation of that [insurance] business." *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 36 (E.D. Ky. 1992). Similarly, the dissent in *Owensboro* found, "[T]here is little doubt that, as the district court determined below, § 92 does not specifically relate to the business of insurance." *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 397 (6th Cir. 1994)(Batchelder, J., dissenting)(Pet. App. at 61a-62a.) As to this question, there is no conflict between circuits.

In passing, Petitioners also assert that the decision conflicts with *United Services Auto Ass'n v. Muir*, 792 F.2d 356 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). In *Muir*, the court found the purpose of the statute was not to protect policyholders, but to "prevent competition between insurers and Pennsylvania financial institutions." *Muir*, 792 F.2d at 364. Pennsylvania's statute, like Kentucky's, is different in character and function.

For these reasons, there is no square conflict between the circuits requiring this Court to grant the petition for certiorari in this matter. At best, the circuit courts are applying complicated legal principles to differing factual circumstances and arriving at a conclusion with which Petitioner simply disagrees.

2. There Is No "National Uncertainty" of "Great Practical Importance"

Because two circuits have reached different results on different facts does not establish "national uncertainty" of "great practical importance." The courts are applying this Court's "relationship" test as stated in *Fabe*, taken "directly from" *SEC v. Nat'l Sec., Inc.*, 393 U.S. at 460 (Pet. App. at 10a.) One should expect different results as each state's insurance statutes are put to the same test.

In support of its statement that there now exists great national uncertainty, Barnett argues that as many as fifteen states have "laws purporting to restrict the ability of national banks to sell insurance within the State's borders." (Pet. at 6, n.1.) One such state, however, has reviewed its law and determined that its statute was not preempted. *First Advantage*, 652 So. 2d at 562. Relying upon the analyses used in *Owensboro* and *Barnett*, Louisiana's Court of Appeal found the state's law protects policyholders "directly or indirectly," *Nat'l Sec.*, 393 U.S. at 460, and is saved from preemption by *McCarran-Ferguson*.

First Advantage shows that courts are applying the principles set forth by this Court's precedents, along with the analyses in *Owensboro* and *Barnett*, to the statutes before them and arriving at fair and reasoned decisions based upon factual determinations of each statute's purpose. Because a statute may be enacted for different purposes, surely different conclusions will be obtained when the statutes are put to the same *Fabe/National Securities* test. Uniform application of these legal principles, always a goal unrealized, will properly evoke differing results on different facts.

3. The Eleventh Circuit's Decision Is Correct

"The two halves of the Eleventh Circuit's analysis manifestly do not fit together" declares the bank. (Pet. App. at 16.) That is because there are not two halves to the Eleventh Circuit's analysis. There are two analyses. Each is independent of the other. To confuse the two is to risk misleading this Court.

The first analysis requires a fact-intensive determination of the *purpose* of the Florida law, applying the *Fabe/National Securities* test. Questions as to whether the Florida's statute protects or regulates policyholders' interests, directly or indirectly, were answered by witnesses, caselaw, and legislative history. See *Glendale*, 584 So. 2d 534, and *Production Credit*, 356 So.2d 31. That evidence was reviewed and accepted *in toto* under the plain error standard for factual determinations, although no such error was even alleged to have occurred. The *McCarran-Ferguson Act*, *Fabe* and *National Securities* were then applied to those facts to determine that section 626.988 is a law possessing the " 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Fabe*, 133 S. Ct. at 2210. See also *Robertson v. California*, 328 U.S. 440 (1946) (licensure and regulation of insurance agents within the state's historic regulation of insurance).

Having determined that the state law was enacted for the purpose of regulating the business of insurance, the Eleventh Circuit proceeded to the second analysis. A second distinct analysis was required because this Court has stated that "State laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *Fabe*, __ U.S. __, 113 S. Ct. at 2211. In the words of the unanimous Eleventh Circuit Court: "To answer this

question, we examine the section's history." *Barnett Bank* 43 F.3d at 636. (Pet. App. at 13a.) No "specific requirement" was found after an exhaustive parsing of this Court's controlling opinions. *Id.* at 636-637. (Pet. App. at 13a-15a.) What was "obvious" to the lower *Owensboro* Court, not addressed by the *Owensboro* Circuit Court majority, deemed a matter of "little doubt" by the *Owensboro* Circuit Court dissenter, and not even argued by *Barnett Bank* at trial below, was that: "Congress could not have been attempting to regulate a business that it believed it had no power to regulate. Congress was concerned with banking, not insurance." *Barnett Bank*, 43 F.3d at 637. (Pet. App. at 15a.)

Those two analyses are consistent and compatible; they fit together perfectly. It is misleading for Petitioner to suggest that one analysis of the McCarran-Ferguson test is "narrower" than the other. Because McCarran-Ferguson governs the interplay of federal and state governments in the regulation of insurance, different policy objectives govern construction of the different terms used in McCarran-Ferguson. In *Fabe*, for example, this Court applied a "clear statement" rule to determine whether a federal statute "relates to the business of insurance." But in determining whether a state statute "regulates" the business of insurance, this Court looked to whether the underlying purpose of the state statute was protection of policyholders.

Each part of McCarran-Ferguson's test must be independently applied, one to the state statute, the other to the federal statute, to determine whether each fits within the intent of McCarran-Ferguson. The Eleventh Circuit correctly applied each analysis to the state and federal statutes at issue, in accordance with this Court's precedents.

4. This Case Is Not An Appropriate Subject for A Writ of Certiorari

The bank argues that because of conflict between this case and *Owensboro*, this case is an appropriate subject for a writ of certiorari. For the reasons set forth above, there is no direct conflict between the circuits in *Barnett* and *Owensboro*. *Barnett* was properly decided. There is no basis for issuing a writ.

5. Comptroller Did Not Intervene Below

The Comptroller of the Currency intervened in the *Owensboro* case in support of the banking interests, whereas in this case, as Petitioner notes (Pet. at 15), the Comptroller simply "voiced concern" by filing an amicus brief in the Eleventh Circuit Court. The Comptroller's filing of an amicus brief below should not substantially influence this Court's decision as to whether to issue a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

DAVID J. BUSCH
Counsel of Record

DANIEL Y. SUMNER
General Counsel

FLORIDA DEPARTMENT OF INSURANCE
200 E. Gaines Street, Suite 645A
Tallahassee, FL 32399-0307
(904) 413-4146

Attorneys for Respondents
Tom Gallagher and the
Florida Department of Insurance

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No. 94-1837

Supreme Court, U.S.
FILED
JUL 7 1995
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**RESPONDENTS INSURANCE AGENTS'
BRIEF IN OPPOSITION**

ANN M. KAPPLER *
SCOTT A. SINDER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000

*Attorneys for Respondents
Insurance Agents*

* Counsel of Record

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BRIEF IN OPPOSITION**

Respondents Florida Association of Life Underwriters,
Professional Insurance Agents of Florida, Inc., and
Florida Association of Insurance Agents (collectively,
the "Insurance Agents") respectfully respond to Petitioner
Barnett Bank of Marion County, N.A.'s (the "Bank's")
Petition For A Writ of Certiorari to review the judgment
of the United States Court of Appeals for the Eleventh
Circuit entered in this action.

STATEMENT OF THE CASE

The judgment entered by the Eleventh Circuit is correct. Nevertheless, the Eleventh Circuit's decision and the Louisiana state court's final decision in *First Advantage Ins., Inc. v. Comm'r of Ins. St. of Louisiana*, 652 So.2d 562 (La. Ct. App., First Cir. 1995), *cert. denied*, No. 95-C-0820 (La. S. Ct. May 5, 1995), *cert. petition filed* No. 94-2130 (June 27, 1995) ("*First Advantage*"), are squarely in conflict with the judgment entered by the United States Court of Appeals for the Sixth Circuit in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) ("*Owensboro*") (reprinted in Petition for a Writ of Certiorari ("Cert. Pet."), Appendix ("Pet. App.") D). Petitions for Writs of Certiorari already have been filed in this case and in *First Advantage*; the Insurance Agents' sister Kentucky associations intend to file a petition for a writ of certiorari in the *Owensboro* case by July 13.¹ The issue is of significant importance to both the banking and insurance industries, and is likely to arise in other States. Indeed, a case is currently pending in a federal district court in Connecticut raising virtually identical issues. See *Shawmut Bank Connecticut, N.A. v. Googins, et al.*, No. 3:94CV146(RNC) (U.S. D.C. D.Conn.).

For the reasons delineated below, the Insurance Agents urge this Court to resolve the conflict by granting the Bank's Petition and reviewing the Eleventh Circuit's judgment in this case.

I. THE ISSUE PRESENTED.

As recognized by the courts and Congress, regulation of the insurance industry in this country has been reserved for the States. At issue in this case is the authority of the Florida Commissioner of Insurance (the "Commissioner") and other state insurance commission-

¹ The Insurance Agents' counsel represent the insurance agent association parties in all three of these cases.

ers around the country to exercise their traditional police power to regulate the sale of insurance. The same fundamental question is at the heart of this case, *Owensboro* and *First Advantage*: Who may regulate insurance activities, including determining which entities may be licensed to sell insurance, in Florida, Kentucky, Louisiana and other States? Is the State Legislature the final determinant, exercising its authority through statutes implemented and enforced by the Commissioner of Insurance? Or can the federal government *sub-silentio* dictate how insurance activities are conducted in each of these States?

Like any other potential insurance agent, banks (and their subsidiaries) are subject to the licensing requirements of state law. A central provision of Florida law, Fla. Stat. 626.988, prohibits all employees of bank holding companies and their subsidiaries, including state and national banks, from selling broad forms of insurance. In enacting this law, the Florida Legislature, as the primary regulator of the business of insurance within the State, was forced to grapple with the difficult consumer protection issues posed by bank sales of insurance. The district court discussed some of these problems at length:

For example, in order to make a profit on automobile loans or home mortgages, the insurance agents may incur business they might otherwise reject because they would be pressured by the bank to do so in order to consummate the bank's loan transactions. This might lead to the over-insurance of risky business, which could result in the insolvency of the insurer.

Additionally, and notwithstanding the existence of specific prohibitions on coercive credit extension, the Court finds that loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-

length relationship be maintained among the bank, the loan officer and the insurance agents. The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders.

Barnett Bank of Marion Co., N.A. v. Gallagher, 839 F. Supp. 835, 842 (M.D. Fla. 1994) (reprinted in Pet. App. B at 3a), *aff'd*, 43 F.3d 631 (11th Cir. 1995) (reprinted in Pet. App. A). Other States have made the same policy decision to maintain a separation between banking and insurance. As the Bank notes, at least fourteen other States have similar laws restricting banks from being licensed to sell general forms of insurance.²

In its Petition for Certiorari, the Bank argues that such licensing prohibitions are pre-empted by Section 13 of the Federal Reserve Act, 12 U.S.C.A. § 92 (1995 Supp.),³ which otherwise permits a national bank "located and doing business in a place in which the population does not exceed 5,000 inhabitants" to act as an agent in the sale of general forms of insurance. Both the district court and the Eleventh Circuit unanimously disagreed with the Bank. Both courts concluded that Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), dictates that Section 92—a law that regulates the business of national banks—may not be interpreted to supersede or pre-empt Fla. Stat. 626.988—a law "enacted for the purpose of regulating the business of insurance." See Pet. App. A & B.

² See Cert. Pet. at 6 & n.1.

³ This provision is commonly known as "Section 92" and will be referred to as such herein. See *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 113 S.Ct. 2173 (1993) (discussing the tortured history of this provision).

II. THE McCARRAN-FERGUSON ACT—LEAVING REGULATION OF THE BUSINESS OF INSURANCE TO THE STATES.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, makes clear, as a matter of federal law, that the States are the penultimate authority in the insurance realm unless Congress intentionally and expressly overrides that authority. Section 2(a) of McCarran is explicit:

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

15 U.S.C. § 1012(a) (emphasis added). McCarran's Section 2(b) further provides:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b).⁴ This law, originally enacted in 1944, did not articulate a new federal policy but instead sought to ensure that the States were permitted to remain the primary regulators of the business of insurance.

Until 1944, it had been universally understood that the States maintained exclusive control over the regulation of insurance. *E.g.*, *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2207 (1993); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978). This

⁴ As even the "Declaration of Policy" provision of McCarran clarifies,

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that *silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.*

15 U.S.C. § 1011 (emphasis added).

axiom of state regulation had existed at least since 1869, when the Supreme Court decided *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). *Paul v. Virginia* involved an appeal by an insurance agent from a fine imposed for selling coverage for a New York insurer that was not properly licensed in Virginia. In disposing of the agent's argument that Virginia licensing laws violated the Commerce Clause of the U.S. Constitution, the Court held that "[i]ssuing a policy of insurance is not a transaction of commerce." *Id.* at 183. Cases following *Paul v. Virginia* held that not only the issuance of a policy, but the entire business of insurance, was *not* commerce regulable by Congress. *E.g.*, *Hooper v. California*, 155 U.S. 648, 649 (1885); *New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 506 (1913). Consistent with this case law, Congress had repeatedly refused to extend federal authority over the insurance business, concluding that the regulation of the insurance business was beyond Congress' power. *See, e.g.*, Sen. Rep. No. 4406, 59th Cong., 1st Sess. (1906); H.R. Rep. No. 2491, 59th Cong., 1st Sess., 12-25 (1906).

All this changed in 1944 with the United States Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), a case cited by the Eleventh Circuit, the *First Advantage* court and the *Owensboro* dissent but, notably, not by the *Owensboro* majority. In upholding a criminal indictment for alleged Sherman Act violations, the Court in *South-Eastern* held, for the first time, that an insurance company was subject to the federal antitrust laws. The decision "naturally, was widely perceived as a threat to state power to tax and regulate the insurance industry." *Fabe*, 113 S. Ct. at 2207. Congress reacted by enacting the McCarran-Ferguson Act. *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 299 (1960). McCarran restored oversight of the insurance industry to the States, except with regard to antitrust issues where a State had failed to act. 15 U.S.C. §§ 1011 *et seq.*

As this Court has explained, McCarran "transformed the legal landscape by overturning the normal rules of pre-emption":

Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) reverses this by imposing what is, in effect, a clear statement rule, *a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.*

Fabe, 113 S. Ct. at 2211 (emphasis added). Disagreement over the parameters of the first prong of this test—determining whether a state law was enacted "for the purpose of regulating the business of insurance"—has created the conflict this Court must now address.

III. THERE IS A SQUARE CONFLICT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

Every court to consider the question has concluded that Section 92 does not "specifically relate to the business of insurance" under Section 2(b) of McCarran. *See* Pet. App. A at 15a; Pet. App. B at 33a-35a; *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 36 (E.D. Ky. 1992), *aff'd on other grnds.*, 44 F.3d 388; *First Advantage*, 652 So.2d at 573-74. There is complete uniformity on this point.

The conflict arises regarding the first inquiry under McCarran. The fundamental disagreement between the Louisiana state court and the Eleventh Circuit on the one hand and the Sixth Circuit on the other is whether state laws that exclude banks from being licensed to sell insurance are "enacted for the purpose of regulating the business of insurance." The Eleventh Circuit and the Louisiana state court squarely disagree with the Sixth Circuit both about whether such laws may be enacted for that "purpose" and about the proper test to make this determination.

The *Owensboro* majority, purporting to apply the standards developed by this Court in the course of construing McCarran's antitrust clause, see *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), flatly held that "[e]xcluding a person from participation in an activity [] is different from regulating the manner in which it is conducted." *Owensboro*, 44 F.3d at 392, Pet. App. D at 49a. Based on this holding, the *Owensboro* majority concluded that any state law that prohibits a bank from being licensed to sell insurance cannot be a law enacted "for the purpose of regulating the business of insurance" within the meaning of McCarran. *Id.*

The Eleventh Circuit and the *First Advantage* court reached an opposite conclusion through the application of the test developed by this Court in *Fabe*. In *Fabe*, the Court emphasized that the scope of the first clause of Section 2(b) is significantly different from the antitrust clause to which the *Owensboro* majority looked.⁵ The general pre-emption clause of McCarran is very broad and encompasses all state laws that have the "end, intention, or aim of adjusting, managing, or controlling the business of insurance." 113 S. Ct. at 2210 (citation omitted). In articulating this standard, the *Fabe* Court relied primarily on the only other Supreme Court decision

⁵ The *Fabe* Court specifically distinguished the broad general immunity from pre-emption by any federal law conferred in the first clause of Section 2(b), from the much narrower immunity from pre-emption by federal antitrust law (i.e., Sherman, Clayton, and Federal Trade Commission Acts) conferred in the Section's second clause. As the *Fabe* Court explained:

[T]he first clause of § 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance. The second clause accomplishes Congress' secondary goal, which was to carve out only a narrow exemption for "the business of insurance" from the federal antitrust laws.

113 S.Ct. at 2210 (citations omitted) (emphasis added). For this reason, the *Owensboro* majority's reliance on the antitrust test articulated in *Pireno* was inappropriate.

addressing the provision, *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969). The *National Securities* Court had concluded that, at its core, the McCarran exemption broadly encompasses state laws "aimed at protecting or regulating th[e] relationship [between insurer and insured], directly or indirectly." *National Securities*, 393 U.S. at 460. Based on this, the *Fabe* Court held that the Ohio bankruptcy priority statute at issue was "enacted for the purpose of regulating the business of insurance" because it was "designed to further the interests of policyholders." *Fabe*, 113 S. Ct. at 2208, 2212.

Based on the factual record created before the trial court and state court case law interpreting the state law provision, the Eleventh Circuit concluded that Florida's prohibition on bank licensure to sell insurance was enacted "for the purpose of regulating the business of insurance" because "it protects policyholders." Pet. App. A at 13a. From this determination, the Eleventh Circuit concluded that, "[u]nder the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interests of policyholders." *Id.* (quoting *Fabe*, 113 S. Ct. at 2208).

The *First Advantage* court adopted the Eleventh Circuit's reasoning to conclude that a Louisiana bank insurance licensing prohibition also is protected from pre-emption by McCarran. See *First Advantage*, 652 So.2d at 572-76. In dissent, Circuit Judge Batchelder argued that the *Owensboro* majority should have done the same. See *Owensboro*, 44 F.3d at 394-97 (Batchelder, J., dissenting), Pet. App. D at 50a-64a.

The import of the Sixth Circuit opinion—reached without any meaningful review of the purpose underlying the enactment of the Kentucky provision—is to impose a blanket rule to the effect that such laws cannot be found to have been enacted for such a purpose. The Eleventh Circuit reached a contradictory conclusion only after con-

ducting a complete review of the State of Florida's proffered purposes for enacting its licensing prohibition. The Eleventh Circuit utilized a carefully considered analysis consistent with this Court's precedents and the federal policies embodied in the McCarran-Ferguson Act. The Sixth Circuit did not.

IV. RESOLUTION OF THIS SQUARE CONFLICT IS ESSENTIAL AND THIS CASE PROVIDES THE BEST VEHICLE FOR THAT RESOLUTION.

As noted by the Bank and at the outset of this brief, the laws of at least 15 States preclude national banks from selling insurance under Section 92 absent pre-emption. Unless this Court resolves the conflict, the two States located in the Sixth Circuit that have such laws (Kentucky and Tennessee) appear to be precluded from applying them by *Owensboro*, while the one restrictive State located in the Eleventh Circuit (Florida) and the State of Louisiana will continue to enforce their prohibitions against national bank insurance sales. There is no way to predict whether the other 12 States will be able to continue to enforce their prohibitions against national banks if challenged. A national bank in Connecticut already has initiated yet another action seeking a determination that the Connecticut prohibition on bank sales of insurance, as applied to national banks, is pre-empted by Section 92. See *Shawmut Bank Connecticut, N.A. v. Googins, et al.*, No. 3:94CV146(RNC) (U.S.D.C. D. Conn.). Other challenges will undoubtedly follow.

This Court cannot permit different standards to be applied to national banks in each of these cases merely by virtue of their location in different States,⁶ nor can it condone the uncertainty that has been created for both national banks and state insurance commissioners through-

⁶ Or to branches of the same national bank located in different states.

out the country by failing to resolve the conflict that now exists.

This case provides the best vehicle for the Court to address this conflict for one simple reason: it is the only case in which a record regarding a State's purpose in enacting its licensing prohibition has been developed. It is therefore the only case in which the Court can fully examine the import of McCarran's "purpose" inquiry and adequately evaluate the Sixth Circuit's determination that laws that preclude designated classes of persons or entities from being licensed to sell insurance are not—as a matter of law—enacted for the "purpose of regulating the business of insurance."

CONCLUSION

For the foregoing reasons, the Insurance Agents respectfully urge this Court to grant the Bank's Petition for a Writ of Certiorari.

Respectfully submitted,

ANN M. KAPPLER *
SCOTT A. SINDER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000

*Attorneys for Respondents
Insurance Agents*

* Counsel of Record

July 7, 1995

No. 94-1837

Supreme Court, U.S.

FILED

JUL 25 1995

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BARNETT BANK OF MARION COUNTY, N. A.,

Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER OF
THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF INSURANCE,
FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC.,
AND FLORIDA ASSOCIATION OF INSURANCE AGENTS,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

RICHARD E. SWARTLEY
General Counsel
BARNETT BANKS, INC.
50 N. Laura Street
Jacksonville, FL 32202
(904) 791-7505

NATHAN LEWIN
(Counsel of Record)
SCOTT L. NELSON
JAMES R. HEAVNER, JR.
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner

1190

(i)

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No. 94-1837

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

**BILL NELSON, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, FLORIDA
DEPARTMENT OF INSURANCE, FLORIDA
ASSOCIATION OF LIFE UNDERWRITERS,
PROFESSIONAL INSURANCE AGENTS OF
FLORIDA, INC., and FLORIDA
ASSOCIATION OF INSURANCE AGENTS,**

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

PETITIONER'S REPLY BRIEF

INTRODUCTION

In their brief in opposition, the respondent insurance agent organizations — the private parties who intervened

below to prevent petitioner Barnett Bank and other similarly situated banks from acting as insurance agents in Florida — agree with Barnett Bank that there is a conflict among the circuits over whether the McCarran-Ferguson Act preserves from preemption state laws that prevent small-town national banks from acting as insurance agents as authorized by 12 U.S.C. § 92. The insurance agents further agree that the issue is one of national importance, and that this case is the appropriate one, among the three presenting the issue that are now before the Court, in which to resolve the issue.¹

The Solicitor General, representing the United States and the Comptroller of the Currency as *amici curiae* supporting Barnett Bank, concurs with Barnett Bank and the insurance agents on these points. Many banks and banking associations have also appeared as *amici curiae* in support of Barnett Bank, emphasizing the directness of the conflict, the importance of the issue, and the suitability of this case as a vehicle for resolving it.

Amidst this striking unanimity among the responsible federal authorities and the affected private interests on both sides of the dispute, the only discordant note is struck by the state governmental respondent, the Insurance Commissioner of the State of Florida.² In his brief in opposition, the Insurance Commissioner, alone among all those directly or indirectly interested in the outcome of this case, denies that

¹ The other two are *Stephens, et al. v. Owensboro Nat'l Bank, et al.*, No. 95-74 (filed July 13, 1995), and *First Advantage Ins., Inc., et al. v. Green, et al.*, No. 94-2130 (filed June 27, 1995).

² We are informed that Bill Nelson has replaced Tom Gallagher as Insurance Commissioner for the State of Florida. In accordance with the governing rules, the caption of petitioner's reply reflects the automatic substitution of Mr. Nelson as a respondent in this proceeding.

there is a genuine conflict among the circuits or an issue otherwise worthy of the attention of this Court. The Insurance Commissioner's effort to paper over the conflict, however, rests on false distinctions and would require this Court simply to ignore the holdings and rationales of the decisions at issue.

The conflict is a real one — indeed, one that has already worsened since we filed our petition for certiorari. The substantial issue presented requires resolution by this Court.

ARGUMENT

A. The Conflict is Genuine.

The Insurance Commissioner begins by asserting that the decision below is not in conflict with the Sixth Circuit's decision in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), because the Kentucky statute at issue in *Owensboro* "only prohibits insurance sales by persons who own a majority interest in the financial institution," and permits "[a] bank with fractured ownership" to sell insurance. Ins. Com. Br. Opp. 9. But the Sixth Circuit, in deciding *Owensboro*, accepted, for purposes of its analysis, the State of Kentucky's position that the statute "applies not only to bank holding companies, but also to subsidiaries thereof, such as national banks." 44 F.3d at 390.

Moreover, the Commissioner's "distinction" ignores that Florida's supposedly "more protective" statute itself does not apply to all national banks in towns under 5,000, but only to those owned by holding companies. Thus, both *Owensboro* and the decision below addressed statutes of virtually identical effect: statutes that purport to forbid small-town national banks owned by holding companies from

engaging in the insurance agency activities allowed by 12 U.S.C. § 92.

More broadly, the Insurance Commissioner tries to distinguish this case from *Owensboro* by painting the decisive question as one of fact turning on the motive of the legislature in enacting the statute at issue. To be sure, the trial court heard evidence in this case about the purpose of the Florida statute, and the Eleventh Circuit based its holding in part upon assertions about the purpose of the statute that it found relevant to its legal analysis. The Sixth Circuit, by contrast, decided *Owensboro* on appeal from a decision granting summary judgment, and held *as a matter of law* that a law forbidding a bank to operate an insurance agency is not a law regulating the business of insurance.

Therein lies the conflict. Under *Owensboro*, the evidence of purpose relied on by the Eleventh Circuit below is simply not material to the inquiry under the McCarran-Ferguson Act. Thus, the difference between the outcome in *Owensboro* and the outcome below did *not*, as the Insurance Commissioner suggests, result from factbound differences between two courts' assessment of evidence of legislative intent. Rather, the different results were due to a fundamental disagreement about a legal issue: what it means for a law to "regulate the business of insurance."

B. *First Advantage* Underscores the Conflict.

The Insurance Commissioner goes even farther afield in contending that the outcome in *First Advantage Ins., Inc. v. Green*, 652 So.2d 562 (La. Ct. App.), *cert. denied*, 654 So.2d 331 (La. 1995), "shows that courts are applying the principles set forth by this Court's precedents, along with the analyses in *Owensboro* and *Barnett*, to the statutes before them and arriving at fair and reasoned decisions based upon

factual determinations of each statute's purpose." Ins. Com. Br. Opp. 12.

Far from it. Contrary to the Commissioner's assertion, the Louisiana court in *First Advantage* did not find the Eleventh Circuit's decision in this case to be "factually and legally distinguishable" from *Owensboro*. Ins. Com. Br. Opp. 9. Nor did that court, as the Insurance Commissioner suggests, render a fact-based decision reconcilable with both *Owensboro* and the Eleventh Circuit's decision in this case. Rather, the *First Advantage* court explicitly recognized that the decision below and *Owensboro* reflected "[c]onflict in [the] Federal Courts" (652 So.2d at 574), and that in order to decide the case, it had to choose between the divergent legal approaches of the two cases. 652 So.2d at 576. The court went on to observe (652 So.2d at 577):

The issues raised in this appeal are the most recent conflicts in the long running turf battle on the part of two powerful industries, namely banking and insurance, each of which is subject to governmental regulation. The jurisprudence reveals that these battles are occurring in states around the country, and different courts are arriving at different results. Ultimately, the various questions raised will have to be answered by the United States Supreme Court.

The Louisiana Supreme Court's denial of certiorari in *First Advantage* (which was reported after our petition for certiorari was filed) confirms that there is a growing conflict on the issue presented by this case: whether the McCarran-

Ferguson Act saves state statutes that prevent national banks from exercising their powers under 12 U.S.C. § 92.³

C. The Court Should Take a Case in Which Both Prongs of the McCarran-Ferguson Issue Have Been Addressed.

The Insurance Commissioner further suggests that the Eleventh Circuit's holding on the second prong of the McCarran-Ferguson issue — that is, whether the federal statute permitting national banks to sell insurance "specifically relates to the business of insurance" — does not merit this Court's attention because there is no explicit conflict among the courts of appeals on this point.

It is, of course, true that the Sixth Circuit in *Owensboro* did not reach this issue. Nonetheless, definitively resolving the conflict over the application of McCarran-Ferguson to state statutes prohibiting national banks from selling insurance may require consideration of both parts of the McCarran-Ferguson analysis. Both the Solicitor General and the insurance agent respondents agree that this Court should take up a case in which both questions have been addressed.

³ Since our petition was filed, a petition for certiorari has been filed in the *First Advantage* case, pointing out the same conflict presented by our petition. See *First Advantage Ins., Inc., et al. v. Green, et al.*, No. 94-2130 (filed June 27, 1995). In that petition, counsel for First Advantage assert that that case is more "ripe" for consideration than this one, because the action of the Louisiana Insurance Commissioner in that case stripped an insurance agent associated with the bank of his license. Without questioning the ripeness of the dispute in *First Advantage*, we point out that this case, involving an action of the Florida Insurance Commissioner that restrains otherwise licensed insurance agents from selling insurance because of their association with Barnett Bank, is equally ripe.

D. The Issue Is Important.

Finally, the Court should discount the Insurance Commissioner's efforts to denigrate the national importance of the issues presented by this case. The Insurance Commissioner's primary interest, after all, is in defending his own state's statute. The uncertainty affecting the banking and insurance industries in other states is of little direct concern to him. A far better indication of the importance of the case is that both banking and insurance agent organizations whose members are directly affected by the conflict (and whose positions on the merits are directly opposed) agree that the issue requires resolution by this Court.

That the interested private industries are joined by the Solicitor General and the Comptroller of the Currency in urging the Court to address the issue only emphasizes its significance. The Insurance Commissioner's odd suggestion that the Comptroller's views should receive little weight because he "only" appeared as an *amicus curiae* below, rather than intervening, should be laid to rest by the decision of the Solicitor General and the Comptroller to file an *amicus* brief in this Court — without waiting for an invitation from the Court — urging the Court to grant certiorari.

CONCLUSION

For the foregoing reasons, as well as those previously set forth, the petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
SCOTT L. NELSON
JAMES R. HEAVNER, JR.
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

RICHARD E. SWARTLEY
General Counsel
BARNETT BANKS, INC.
50 N. Laura Street
Jacksonville, FL 32202
(904) 791-7505

July 1995

Attorneys for Petitioner

JUL 7 1995

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

**BARNETT BANK OF MARION COUNTY, N.A.,
PETITIONER**

v.

**TOM GALLAGHER, FLORIDA INSURANCE
COMMISSIONER, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
AND THE COMPTROLLER OF THE CURRENCY
AS AMICI CURIAE SUPPORTING PETITIONER**

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

**ANTHONY J. STEINMEYER
JACOB M. LEWIS**
Attorneys

JULIE L. WILLIAMS
Chief Counsel

**L. ROBERT GRIFFIN
ERNEST C. BARRETT III**

JOAN M. BERNOTT
Attorneys
*Office of the Comptroller
of the Currency*
Washington, D.C. 20219
(202) 874-5200

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether 12 U.S.C. 92 (Supp. V 1993), which provides that national banks in places with no more than 5,000 inhabitants may act as insurance agents, pre-empts a state law that prohibits most such banks from engaging in most insurance agency activities.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1837

BARNETT BANK OF MARION COUNTY, N.A.,
PETITIONER

v.

TOM GALLAGHER, FLORIDA INSURANCE
COMMISSIONER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AND THE COMPTROLLER OF THE CURRENCY
AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES AND
THE COMPTROLLER OF THE CURRENCY

The Comptroller of the Currency is the primary regulator of banks chartered under the National Bank Act, 12 U.S.C. 21 *et seq.* See *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995). The Comptroller accordingly has an interest in assuring that national banks are able to exercise, subject to his supervision, the powers granted to them by Congress, including the power to engage in insurance agency activities set out in 12 U.S.C. 92 (Supp. V 1993). The United States

also has an interest in the proper interpretation of the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, on which the court of appeals relied in holding that Section 92 does not preempt the state law at issue here.

The Comptroller participated as an amicus curiae before the court of appeals in this case. The United States, on the Comptroller's behalf, also intervened as a party in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) (time for filing petition for a writ of certiorari extended, No. A-916 (June 1, 1995)), which held that Section 92 preempts a Kentucky statute that purports to restrict the insurance agency activities of national banks in much the same way as the Florida statute at issue in this case. The Comptroller has participated as a party in two recent cases in this Court concerning the validity and scope of Section 92. See *NationsBank of North Carolina, supra*; *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173 (1993). The United States has participated in numerous cases involving interpretation of the McCarran-Ferguson Act. See, e.g., *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993); *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993).

STATEMENT

1. Belleview, Florida, is a town with fewer than 5,000 inhabitants. Petitioner Barnett Bank of Marion County, N.A., is a national bank with a branch in Belleview. Petitioner is a wholly owned subsidiary of Barnett Banks, Inc., a Florida bank holding company. Pet. App. 20a; see also Pet. ii.

In October, 1993, petitioner purchased the assets and business of Linda Clifford Insurance, Inc. (LCI), an insurance agency also located and doing business

in Belleview. LCI's employees, including Clifford herself, became employees of petitioner. Pet. App. 20a. Four days after the purchase, respondent Gallagher, the state Insurance Commissioner, ordered Clifford and LCI to cease and desist from engaging in any "insurance agency activity." *Id.* at 19a. Respondent relied on Fla. Stat. Ann. § 626.988 (West Supp. 1995) (*reprinted at* Pet. 4-5), which generally prohibits an otherwise licensed insurance agent from engaging in "insurance agency activities" if he or she is associated in any way with a "financial institution." Under the statute, "insurance agency activities" include the sale or servicing of insurance policies other than credit life or credit disability policies, and the term "financial institution" includes (among other things) most banks and bank holding companies, including petitioner. Fla. Stat. Ann. § 626.988 (1)(a) and (b) (West Supp. 1995).¹

2. Petitioner sued respondents Gallagher and the Florida Department of Insurance for declaratory and injunctive relief, contending that federal law preempts application of Section 626.988 to prohibit petitioner's operation of LCI. Petitioner relied on Section 13, para. 9, of the Federal Reserve Act, 12 U.S.C. 92 (Supp. V 1993), which provides that any national bank located and doing business in a

¹ The statute excludes from the definition of "financial institution" any bank holding company exempted from regulation by the Federal Reserve Board under Section 4(d) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(d) (relating to companies that have held a small bank since before July 1, 1968), and any bank "which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000." Fla. Stat. Ann. § 626.988(1)(a) (West 1995). Neither exclusion applies to petitioner.

place with no more than 5,000 inhabitants may, under supervision by the Comptroller, "act as the agent for any fire, life, or other insurance company" that is authorized to do business in that State. See Pet. App. 18a.

The district court denied petitioner's request for relief. Pet. App. 17a-36a. The court recognized that Section 626.988 was inconsistent with Section 92. Pet. App. 23a-24a. However, the court accepted respondents' argument that Section 626.988 was saved from preemption by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). See Pet. App. 25a-35a. That Act provides that federal law will not preempt a state statute "enacted * * * for the purpose of regulating the business of insurance," unless the federal law "specifically relates to the business of insurance." 15 U.S.C. 1012(b). The district court first concluded that Section 626.988 was enacted "for the purpose of regulating the business of insurance." Pet. App. 26a-32a. The court then held that Section 92 does not "specifically relate[] to the business of insurance," and that it "fails to manifest any express intent to preempt state insurance laws." *Id.* at 32a-35a. The court accordingly sustained the State's application of Section 626.988 to prevent petitioner from operating LCI.

3. The court of appeals affirmed. Pet. App. 1a-16a. The court first held that it had jurisdiction to decide petitioner's claim. *Id.* at 5a-6a. The court then examined Florida law (*id.* at 8a-13a), and concluded that the aim of Section 626.988 is to protect insurance policyholders by preventing "the loss of arm[']s-length transactions and objectivity" that might occur when "[a] bank becomes involved with insurer and insured." Pet. App. 12a. The court therefore agreed that Section 626.988 "regulates the

business of insurance" for purposes of the McCarran-Ferguson Act.

Turning to 12 U.S.C. 92 (Supp. V 1993), the court concluded (Pet. App. 13a-15a) that the history of that Section, and its relationship to the National Bank Act and the Federal Reserve Act, indicated that in enacting it "Congress was concerned with banking, not insurance." *Id.* at 15a. On that basis, the court also agreed with the district court's determination that Section 92 neither "specifically relates to the business of insurance" nor otherwise "specifically requires" the preemption of conflicting state laws. Pet. App. 15a (quoting 15 U.S.C. 1012(b) and *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2211 (1993)).

ARGUMENT

The decision below is incorrect, and conflicts with a decision of another federal court of appeals. The question presented is one of substantial importance to the Comptroller of the Currency, as the primary regulator of banks chartered under the National Bank Act; to national banks themselves; to those engaged in the business of insurance; to the state regulators primarily charged with regulating that business; and to consumers of insurance products throughout the country. The matter therefore warrants review and resolution by this Court.

1. Section 13, para. 9, of the Federal Reserve Act, 12 U.S.C. 32 (Supp. V 1993), provides in relevant part that national banks

located and doing business in any place the population of which does not exceed five thousand inhabitants * * * may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire,

life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent.

Petitioner, a national bank doing business in a small Florida town, relied on the explicit federal-law authority reflected in Section 92 when it acquired and attempted to operate a local insurance agency. It was prevented from conducting the agency's business by state insurance authorities, who relied on a state law that prohibits sales of most types of insurance by agents associated with a small-town bank that, like petitioner (and like most other national banks), is owned by a bank holding company. Fla. Stat. Ann. § 626.988 (West Supp. 1995).

As both courts below acknowledged (see Pet. App. 3a, 8a, 23a-24a), the federal and state laws on which the parties respectively rely are in irreconcilable conflict. Resolution of the question presented therefore depends on whether normal principles of preemption are superseded by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). In applying McCarran-Ferguson to this case, the court of appeals held that Fla. Stat. Ann. § 626.988 (West Supp. 1995) was "enacted * * * for the purpose of regulating the business of insurance," and that 12 U.S.C. 92 (Supp. V 1993) does not "specifically relate[] to the business of insurance." The court erred on both counts.

a. Section 626.988 does not affect how the insurance business is conducted in Florida. It imposes no

standard, and requires or forbids no practices, related to the substance of that business. It regulates neither the "transferring or spreading [of] a policyholder's risk," nor any other practice that is "an integral part of the policy relationship between the insurer and insured." See *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 391-392 (*reprinted at* Pet. App. 39a, 46a-47a). Instead, it regulates the conduct of "financial institutions," including certain national banks, by prohibiting them, under most circumstances, from acting as or affiliating with insurance agents, even if they comply with all the State's generally applicable rules and regulations governing the conduct of such agents or the insurance business. Moreover, in the case of small-town banks, that prohibition applies only to banks that are "subsidiar[ies] or affiliate[s] of a bank holding company," and therefore amounts to regulation, not of the bank's insurance activities, but of its ownership structure. Section 626.988 was therefore not "enacted * * * for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act; it was enacted for the purpose of regulating the business of banking.

With the exception of the court below in this case, the federal courts of appeals have uniformly concluded that state laws restricting the insurance activities of national banks do not regulate the business of insurance, and therefore do not fall within McCarran-Ferguson's protections. In addition to the *Owensboro* decision, discussed below, which conflicts directly with the decision in this case, the court in *First Nat'l Bank of E. Arkansas v. Taylor*, 907 F.2d 775, 779-780 (8th Cir.), cert. denied, 498 U.S. 972 (1990), concluded that a State could not apply its

restrictions on the sale of insurance to the sale of debt cancellation contracts by national banks, primarily because the Comptroller had construed the general banking powers conferred by 12 U.S.C. 24 Seventh (1988 & Supp. V 1993) to permit national banks to sell such contracts. The court rejected the State's argument that McCarran-Ferguson prevented preemption of its rules, observing that that Act "was not directed at the activities of national banks," and that where contract sales were authorized by federal law they "[did] not constitute the 'business of insurance'" within the meaning of Section 1012(b). *First Nat'l Bank of E. Arkansas*, 907 F.2d at 779.

Similarly, in *United Services Auto. Ass'n v. Muir*, 792 F.2d 356 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987), the court of appeals considered an insurance company's suit to enjoin state regulators from revoking the company's license on the ground that its purchase of a bank was in violation of a state statute prohibiting mergers between financial institutions and insurance companies. In rejecting the State's claim that the McCarran-Ferguson Act protected its statute from preemption, the court emphasized that "affiliation between insurers and banks has no integral connection to the relationship between the insured and insurer." 792 F.2d at 364. As the court concluded, laws such as Pennsylvania's "have no part in the business of insurance under McCarran-Ferguson." *Ibid.* See also *Independent Bankers Ass'n of America v. Heimann*, 613 F.2d 1164, 1170-1171 (D.C. Cir. 1979) (upholding Comptroller's regulation of disposition of income from sale of credit life insurance by national banks: "Nothing in the McCarran-Ferguson Act was intended to affect the power of the Comptroller under authority of Congress to regulate 'unsafe and unsound' banking practices

of national banks."), cert. denied, 449 U.S. 823 (1980).

In holding that Section 626.988 was enacted "for the purpose of regulating the business of insurance," the court of appeals here purported to apply the standards set out by this Court in *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), and *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). See Pet. App. 9a-13a. As both *Fabe* and *National Securities* make clear, however, "the focus of McCarran-Ferguson is upon the relationship between the insurance company and its policyholders." *Fabe*, 113 S. Ct. at 2208; see *National Securities*, 393 U.S. at 460 ("The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these [are] the core of the 'business of insurance.'"). On that basis, *Fabe* held that a state law governing priority of claims in bankruptcy came within the scope of McCarran-Ferguson only to the extent that it protected policyholders, because to that extent it was "integrally related to the performance of insurance contracts." 113 S. Ct. at 2209. *National Securities* held that a law requiring the state insurance commissioner to certify that an insurance company merger was not inequitable to stockholders fell outside the scope of Section 1012(b), because in requiring that approval the State was "not attempting to secure the interests of those purchasing insurance policies," but rather had "focused its attention on stockholder protection." 393 U.S. at 460.

In this case, the court of appeals held that Section 626.988 "protects policyholders" because it safeguards "the financial stability of insurance companies" by preventing improper "pressures" that "could force an insurer to assume a bad risk to quickly consum-

mate a bank loan, or could push a bank customer to take out unnecessary insurance where the bank's only motive is profit." Pet. App. 12a-13a. Those are implausible motivations for the enactment of a broad ban on bank-related insurance agencies. The risk that an agent might sell customers "unnecessary insurance" (which could, of course, only *enhance* the "financial stability" of the insurer) has no evident connection to whether or not the agent is somehow related to a bank (let alone to whether the bank, in turn, is owned by or affiliated with a bank holding company). Similarly, it is unlikely that in enacting Section 626.988 the State was actually concerned with the speculative risk that a bank might attempt to "tie" the availability of a commercial loan to an insurer's willingness to take imprudent underwriting risks, let alone the even more remote risk that it might succeed in doing so.²

We do not mean to suggest that the legislative goals suggested by the court of appeals are so insubstantial that the state law, considered by itself, is not a rational exercise of the State's general legislative powers. If challenged under the Fourteenth Amendment, a State's economic and commercial regulations

² State law separately prohibits tying the extension of credit to the purchase of insurance. Fla. Stat. Ann. § 626.9551 (West 1984). And federal law prohibits national banks from tying the extension of credit to the purchase of any other product. 12 U.S.C. 1972 (1988 & Supp. V 1993). We also note that Section 626.988's restrictions do not apply to any small-town bank not owned by a holding company; to certain exempted bank holding companies; or to agents affiliated with non-bank subsidiaries engaged in certain insurance agency activities permitted under the Bank Holding Company Act. Fla. Stat. Ann. § 626.988(1)(a) and (3) (West Supp. 1995). The court of appeals offered no explanation for those exceptions.

are presumed to be valid; any inquiry into the legislature's "actual" purposes is generally inappropriate, and the question is only whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 113 S. Ct. 2637, 2642-2643 (1993) (quoting *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993)). As the court of appeals pointed out (Pet. App. 11a-12a), a state appellate court has twice held that Section 626.988 meets that undemanding standard, based on hypothetical legislative purposes much like those posited by the court in this case. *Glendale Fed. Sav. & Loan Ass'n v. State*, 587 So. 2d 534, 536-537 & n.1 (Dist. Ct. App. 1991), review denied, 599 So. 2d 656 (Fla. 1992); *Production Credit Ass'ns of Florida v. Department of Insurance*, 356 So. 2d 31 (Fla. Dist. Ct. App. 1978).

This case involves quite a different sort of challenge. The state law in question, as applied to petitioner, conflicts with a federal law, and to that extent it is presumptively invalid. Its application to petitioner may be upheld only if the law meets the requirements of 15 U.S.C. 1012(b), which specifically mandates an inquiry into the State's "purpose" in enacting it. See *Fabe*, 113 S. Ct. at 2209-2210 & n.6 (emphasizing "purpose" requirement). That inquiry is practical and realistic, not merely conjectural. Cf. *National Securities*, 393 U.S. at 457, 460 (focusing on State's actual purpose in enacting law restricting insurance company mergers).

"The selling * * * of policies * * * and the licensing of * * * agents" can be part of the "business of insurance" for purposes of the McCarran-Ferguson Act. See *National Securities*, 393 U.S. at 460. In this case, however, Section 626.988 precludes an entire class of otherwise qualified (indeed, otherwise

already licensed) insurance agents from selling almost any kind of insurance, solely because they are affiliated with a national bank that is owned, in turn, by a bank holding company. If the State was actually concerned, as the court of appeals suggested (Pet. App. 12a), either with coercive bank lending practices or with banks' taking advantage of their customers, then Section 626.988 is best characterized (as discussed above) as an effort to regulate the business of banking, not the business of insurance. The most plausible explanation for the rule against bank affiliation is, however, a desire to protect other insurance agents from competition from agents affiliated with banks. See *United Services Auto. Ass'n v. Muir*, 792 F.2d at 364. Such a law is not "aimed at protecting or regulating," even "indirectly," "the relationship between the insurance company and its policyholders." *Fabe*, 113 S. Ct. at 2208; see *National Securities*, 393 U.S. at 460 ("The crucial point is that here the State * * * is not attempting to secure the interests of those purchasing insurance policies."); *Muir*, 792 F.2d at 364 ("affiliation between insurers and banks has no integral connection to the relationship between the insured and insurer"). In either case, Section 626.988 was not "enacted * * * for the purpose of regulating the business of insurance" within the meaning of Section 1012(b).

b. Thus, we think the court of appeals erred in concluding that Section 626.988 satisfied the first requirement for protection from preemption under the McCarran-Ferguson Act. If the court of appeals was correct, however, then 12 U.S.C. 92 (Supp. V 1993) nonetheless preempts application of the state law to petitioner. McCarran-Ferguson defeats the preemptive effect of federal law only if the state law was enacted for the purpose of regulating the business of

insurance *and* if the federal law does not specifically relate to that business. If the court of appeals was correct that Section 626.988 regulates "the business of insurance" within the meaning of McCarran-Ferguson, then Section 92 "specifically relates to the business of insurance" for purposes of that Act.

Section 92 provides that any national bank located in a place with no more than 5,000 inhabitants may "act as the agent for any fire, life, or other insurance company" otherwise authorized to do business in the relevant State, "by soliciting and selling insurance and collecting premiums on policies," and "may receive for services so rendered such fees or commissions as may be agreed upon * * * [with] the insurance company for which [the bank] may act as agent." Apart from authorizing the Comptroller to prescribe "such rules and regulations" as he deems necessary to regulate those activities, the statute adds two specific provisos: The bank may guarantee neither the payment of any premium on a policy issued through its agency, nor the truth of any statement made by a customer in applying for insurance. The word "insurance" appears in the statute five times. Despite these detailed provisions concerning the insurance agency activities in which certain national banks may engage, the court of appeals concluded (Pet. App. 13a-15a) that Section 92 does not "specifically relate[] to the business of insurance."

The court emphasized Section 92's relationship to the National Bank Act and the Federal Reserve Act, and remarked that "[b]oth Acts concern banking, not insurance." The court also observed that when Congress enacted Section 92, regulation of the business of insurance was thought to lie beyond the scope of federal power under the Commerce Clause. The court then held that, in enacting Section 92, "Con-

gress could not have been attempting to regulate a business that it believed it had no power to regulate." Rather, in the court's view, "Congress was concerned with banking, not insurance." Pet. App. 14a-15a.

The court's reasoning is unpersuasive. Section 1012(b) permits preemption by any federal law that "specifically relates" to the insurance business. Whatever else Congress may have thought when it enacted Section 92, it surely sought to authorize national banks located in small towns to act as insurance agents.³ If Florida's effort to preclude such banks (when owned by or affiliated with holding companies) from selling insurance is correctly characterized as being for the purpose of regulating "the business of insurance," then Congress's express permission for them to do so must certainly "specifically relate[]" to the same business.

The court's contrary holding is internally inconsistent. It would be plausible to hold that both Florida's attempt to restrict banks from acting as insurance agents, and Section 92's limited permission to certain banks to do so, are laws that "concern banking, not insurance." Pet. App. 14a-15a. In that case, the McCarran-Ferguson Act has no application, and fed-

³ Nor is or was there any question of Congress's power to grant that authorization, subject both to supervision by the Comptroller and to the operation of "general and undiscriminating state laws" that "do not conflict with the letter or the general objects and purposes of Congressional legislation." *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 290 (1896); see also, e.g., *id.* at 283; *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 33 (1875); *Easton v. Iowa*, 188 U.S. 220, 238 (1903); *Owensboro Nat'l Bank v. Owensboro*, 173 U.S. 664, 667-668 (1899).

eral law prevails. Alternatively, one could plausibly conclude both that the state law was enacted to regulate, and that the federal law relates to, "the business of insurance," in which case McCarran-Ferguson allows preemption by its terms. It is wholly implausible, however, to treat the state law at issue here as one enacted to regulate the insurance business, while holding that the conflicting federal law does not even "relate" to that business. And the McCarran-Ferguson Act, which was enacted 32 years after Section 92 in an effort to restore the status quo concerning state insurance regulation after this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), could not have been intended to allow individual States to override an express (and previously unquestioned) congressional grant of authority to national banks. See *First Nat'l Bank of E. Arkansas*, 907 F.2d at 779-780.⁴

2. The decision below conflicts directly with the Sixth Circuit's decision in *Owensboro Nat'l Bank v. Stephens*, *supra* (reprinted at Pet. App. 39a-64a).⁵ *Owensboro* held that Section 92 preempts a Kentucky statute, Ky. Rev. Stat. Ann. § 287.030(4) (Michie 1988), to the extent that the state law would otherwise prohibit national banks in small towns from

⁴ With respect to the purposes underlying enactment of the McCarran-Ferguson Act, see, e.g., *Fabe*, 113 S. Ct. at 2207; *National Securities*, 393 U.S. at 459; H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945); 91 Cong. Rec. 1442 (1945) (statement of Sen. McCarran).

⁵ As discussed above, the decision is also in substantial tension with the decisions in *First Nat'l Bank of E. Arkansas v. Taylor*, *supra*; *United Services Auto. Ass'n v. Muir*, *supra*; and *Independent Bankers Ass'n of America v. Heimann*, *supra*.

"act[ing] as insurance agent or broker with respect to any insurance" except credit life, credit health, or mortgage-related real property insurance. In contrast to the court in this case, the Sixth Circuit held that a state law restricting the ability of banks and bank holding companies to act as insurance agents does not have the "purpose of regulating the business of insurance" for purposes of 15 U.S.C. 1012(b). "Excluding a person from participation in an activity," the court explained, "is different from regulating the manner in which that activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity." Pet. App. 48a. Because the Kentucky law "in no way governs the manner in which the activities constituting the 'business of insurance' are conducted," the court concluded, it was "enacted for the purpose of regulating certain conduct by bank holding companies, not the business of insurance." *Id.* at 49a.

Owensboro's holding cannot be reconciled with that of the court below. As construed for purposes of decision (see Pet. App. 44a), the state statutes involved in this case and in *Owensboro* differ only in insignificant details. The Sixth Circuit's conclusion that Kentucky's non-affiliation law did not fall within the scope of the McCarran-Ferguson Act was not based on any special feature of that law, and there is no reason to believe that the *Owensboro* court would have found the Act any more relevant to the Florida statute at issue in this case.⁶

⁶ The Sixth Circuit's resolution of the first question under the McCarran-Ferguson Act made it unnecessary for the court to consider whether Section 92 "specifically relates" to the business of insurance for purposes of that Act.

The decisions in these cases thus leave national banks, the Comptroller, state insurance regulators, and consumers subject to different legal regimes from State to State. Moreover, because the issue is one of considerable commercial importance, it can be expected to arise in other States and in other circuits. See Pet. 6 n.1 (citing state laws imposing restrictions in apparent conflict with Section 92); *First Advantage Ins., Inc. v. Green*, 652 So. 2d 562 (Ct. App.) (McCarran-Ferguson protects Louisiana statute from preemption by Section 92), review denied, 654 So. 2d 331 (La. 1995); *Shawmut Bank v. Googins*, No. 3:94-CV-146 (JAC) (D. Conn.) (motion for summary judgment pending). The existing conflict is therefore only likely to deepen over time. Moreover, there is no reason to believe that further exploration of the matter in the lower courts would materially assist this Court in its consideration of the issue.

3. The decision below permits significant and unwarranted state interference with activities that Congress has specifically authorized national banks to undertake, and with the Comptroller of the Currency's discharge of his "primary responsibility" for the supervision and regulation of those activities. See *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995); see also 12 U.S.C. 92 (Supp. V 1993) (subjecting banks' insurance activities to "such rules and regulations as may be prescribed by the Comptroller"). The Comptroller believes that agency sales of insurance represent a safe and important line of business for banks that can contribute materially to their overall safety and soundness. Moreover, in the Comptroller's view, state restrictions that prevent national banks located in small towns from exercising the in-

insurance agency powers specified in Section 92 can put those banks at a serious disadvantage in the increasingly competitive market for financial services of all kinds. Finally, both the Comptroller and the United States are concerned that state restrictions of the type at issue here may operate to restrict competition, to the detriment of consumers, without significant countervailing consumer protection benefits. The question presented is therefore of considerable importance, and warrants resolution by this Court.

4. The appellants below in *Owensboro* have sought and obtained an extension of time "to complete preparation of [their] petition for a writ of certiorari" in that case. A-916 App. for Ext. of Time 4 (granted June 1, 1995). The Comptroller was a respondent below in *Owensboro*, and we will respond to any petition that is filed in that case. In our view, however, this case is a better vehicle than *Owensboro* for this Court's consideration of the preemption issue, for two reasons. First, the court of appeals in this case, unlike the court in *Owensboro*, found it necessary to reach both of the questions that may be pertinent under the McCarran-Ferguson Act: Whether the state law in question was "enacted * * * for the purpose of regulating the business of insurance," and whether Section 92 "specifically relates" to that business. Although this Court might well, like the *Owensboro* court, resolve this case on the basis of the first question, it would appear preferable to grant review in a case in which the court below considered and decided both questions.

Second, we note that *Owensboro* was decided on the assumption that the state law at issue in that case, which by its terms applies to bank holding companies, also applied to the national bank plaintiffs.

See Pet. App. 44a. While we have no reason to question that assumption, it appears that the question has not been settled as a matter of state law. *Ibid.* The *Owensboro* court noted that there appeared to be no question of justiciability, *id.* at 42a n.1, but it might be preferable for this Court to grant review in a case in which the applicability of the challenged state statute to the party before it is unmistakably clear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
JACOB M. LEWIS
Attorneys

JULIE L. WILLIAMS
Chief Counsel
L. ROBERT GRIFFIN
ERNEST C. BARRETT III
JOAN M. BERNOTT
Attorneys
Office of the Comptroller
of the Currency

JULY 1995

6
No. 94-1837

Supreme Court, U.S.
FILED
JUL 7 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

vs.

TOM GALLAGHER, INSURANCE COMMISSIONER OF
THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF
INSURANCE, FLORIDA ASSOCIATION OF LIFE
UNDERWRITERS, PROFESSIONAL INSURANCE
AGENTS OF FLORIDA, INC., AND FLORIDA
ASSOCIATION OF INSURANCE AGENTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

H. RODGIN COHEN
MICHAEL M. WISEMAN
MICHAEL E. JOHNSON
SULLIVAN & CROMWELL
Of Counsel

NORMAN R. NELSON
General Counsel
The New York Clearing
House Association
Of Counsel

July 7, 1995

BRUCE E. CLARK
125 Broad Street
New York, New York 10004
(212) 558-4000

*Counsel of Record for The
New York Clearing House
Association, Amicus
Curiae*

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IN THE

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October Term, 1994

No. 94-1837

BARNETT BANK OF MARION COUNTY, N.A.,
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—v.—

TOM GALLAGHER, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 37.2 of this Court, this brief is respectfully submitted by The New York Clearing House Association (the "Clearing House") with the consent of all parties.

Interest of *Amicus Curiae*

The Clearing House is an unincorporated association of eleven commercial banks in New York City.¹ The Clearing

¹ The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, NatWest Bank N.A., European American Bank, and Republic National Bank of
(continued...)

House frequently appears as *amicus curiae* in cases, such as this one, which raise important questions concerning the powers of its member banks.

The Clearing House has a significant interest in the questions presented by the petition for a writ of certiorari filed herein because of its member banks' interest and potential involvement in the sale of insurance products pursuant to 12 U.S.C. § 92 ("Section 92"). In an era of rapid consolidation of the financial services industry and increasing lack of differentiation among financial products, it is essential that commercial banks be permitted to offer insurance products to the extent authorized by Congress. State statutes and judicial interpretations that would limit that authority damage the Clearing House member banks and other members of the banking industry, harm consumers of financial services and are antithetical to our political and commercial system.

Moreover, unless this Court grants the petition, there will be confusion and uncertainty as to the ability of banks to sell insurance pursuant to Section 92 in numerous states that have laws similar to the Florida statute in question here or that may enact such laws in the future.

The Eleventh Circuit's decision below, *Barnett Bank, N.A. v. Gallagher*, 43 F.3d 631 (11th Cir. 1995) ("*Barnett Bank*"), upheld a Florida statute forbidding certain national banks to sell insurance. That decision is not only inconsistent with the plain meaning of the McCarran-Ferguson Act, 15

¹(...continued)

New York. Four members of the Clearing House, The Chase Manhattan Bank, N.A., Citibank, N.A., NatWest Bank N.A., and Republic National Bank of New York, are national banks subject to the National Bank Act, ch. 106, 13 Stat. 99 (1864) (codified, as amended, in sections of Title 12 of the United States Code, which includes 12 U.S.C. § 92, discussed herein).

U.S.C. § 1012(b), but squarely conflicts with the Sixth Circuit's earlier decision in *Owensboro National Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) ("*Owensboro*"). Members of the Clearing House are directly affected by the decision below because of the uncertainty that it creates. There is now a question whether 12 U.S.C. § 92, the federal statute that "almost 80 years ago . . . authorized any national bank" to sell insurance, *United States Nat'l Bank v. Independent Ins. Agents of America, Inc.*, ___ U.S. ___, ___, 113 S. Ct. 2173, 2176 (1993), will be held effective in the face of a state statute that prohibits such sales.²

Statutes Involved

This case involves the interpretation of two federal statutes and one state statute, which read in relevant part as follows:

15 U.S.C. § 1012(b) (the McCarran-Ferguson Act)

"[N]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance"

12 U.S.C. § 92

"In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such

² In *United States National Bank*, the Court resolved another conflict regarding Section 92 among the Courts of Appeals when it held that Section 92 was in force and had not been repealed.

rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: Provided, however, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: And provided further, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance."

Fla. Stat. ch. 626.988(2)

"No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency."³

³ "Specifically excluded from this definition ['Financial institution'] is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census." Fla. Stat. ch. 626.988(1)(a). Petitioner is a national bank subsidiary of a bank holding company, and as such does not benefit from this exclusion.

Summary of Argument

The Framers of the Constitution adopted a basic policy for this nation, designed to ensure against a balkanized and ultimately weakened economy, that matters of commerce should be the province of the Congress and not the individual states, U.S. Const. art. I, § 8, *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824), although Congress may cede its powers in specific instances to the states.

In the case of regulation of insurance, Congress has ceded certain powers to the states in the McCarran-Ferguson Act, but only under specified and limited circumstances. The McCarran-Ferguson Act establishes a two-part test for a state statute to be immune from federal preemption. First, the state statute must "regulate the business of insurance" before it may be enforced over a conflicting federal statute. Second, even if the state statute satisfies this first requirement, the federal statute will still preempt the state statute if the federal statute "specifically relates to the business of insurance."

The court below adopted the self-contradictory proposition that a state statute that *bans* banks and their affiliates from selling insurance is "regulation" of the business of insurance, but that a federal statute that *authorizes* the sale of insurance does not even "relate to" the business of insurance. As discussed below, the Clearing House believes that the court below was in error on both prongs of the McCarran-Ferguson test. In any event, it should be beyond doubt that the court below cannot be correct on both prongs. If a statute barring insurance sales "regulates" the business of insurance, then a statute specifically authorizing insurance sales must "relate to" that business.

The petition should be granted, first, because the first prong of the McCarran-Ferguson test has produced a conflict between the Sixth and Eleventh Circuits as to whether a state

statute that prohibits national banks from selling insurance is a "law enacted . . . for the purpose of regulating the business of insurance." The court below held that the Florida statute regulated the business of insurance; the Sixth Circuit in *Owensboro* held that the Kentucky law under scrutiny in that case was not such a statute. The two statutes are identical in substance in that they both would bar banks from the sale of insurance. These two holdings are clearly inconsistent interpretations of the McCarran-Ferguson Act, a conflict which the Court should resolve.

Second, although the McCarran-Ferguson Act clearly limits the ability of the states to override federal law, by stating that a federal law that specifically relates to the business of insurance will preempt a state statute that regulates the business of insurance, the Eleventh Circuit virtually ignored this limitation by an extraordinarily restrictive interpretation of the term "relates to." This interpretation added two requirements which are not contained in the statute. First, the court below ruled that, before according a federal statute such as Section 92 preemptive effect, the federal law must specifically require that the state statute yield to it. Second, the Eleventh Circuit held that a federal statute such as Section 92 must actually "regulate" the business of insurance, not just "relate to" that business. The Clearing House submits that the Eleventh Circuit was bound by the clear language of the McCarran-Ferguson Act, and that it was not entitled to add requirements that Congress did not adopt.

In view of the conflict between the Eleventh Circuit's interpretation of the second prong of the McCarran-Ferguson Act and the clear language of the statute, this Court should resolve the question of whether Section 92 relates to the business of insurance because, absent such resolution, another conflict between circuits and a petition to the Court to resolve that conflict is a virtual certainty.

The current conflict among the courts of appeals in interpreting the McCarran-Ferguson Act is creating great confusion about what federal law requires, state by state and circuit by circuit. Petitioner has identified 13 other states that have enacted legislation similar to the statutes in Florida and Kentucky. (Pet. at 6 & n.1.) These 13 states are located in seven different judicial circuits, at least five of which have not yet addressed the issue. Other states may consider such legislation in the future. Whatever the Court's decision on the merits, there is a compelling need for certainty about what the federal law now requires. The petition should be granted.

ARGUMENT

I.

There is a Clear Conflict Among the Circuits on the Issues Presented by the Petition.

The Eleventh Circuit's decision below directly contradicts the Sixth Circuit's interpretation of the McCarran-Ferguson Act in *Owensboro*, as well as the Third Circuit's decision nearly a decade ago in *United Services Automobile Association v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) ("*Muir*").⁴

⁴ In *Muir*, the court was faced with the question whether a federal court should abstain from review of a supremacy clause challenge to a Pennsylvania statute that prohibited issuing an insurance license to an affiliate of a lending institution. The court of appeals, applying the standards articulated by this Court in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982), rejected the district court's conclusion that abstention was appropriate because McCarran-Ferguson gave the states exclusive control over the regulation of insurance. The Third Circuit held that state laws that forbids banks from selling insurance "have no part in the business of insurance under McCarran-Ferguson." *Muir*, 792 F.2d at 364.

The Eleventh Circuit decided that the McCarran-Ferguson Act requires that Section 92, a federal statute that authorizes national banks to sell insurance, must yield to a Florida statute that prohibits such sales by national banks, such as the petitioner, that are subsidiaries of bank holding companies.

In order to reach this conclusion, the Eleventh Circuit first had to determine that a total ban on bank sales of insurance constituted "regulation" of insurance. Although "regulation" and "prohibition" are different and not synonymous terms,⁵ the Eleventh Circuit ignored this difference. Instead, the court below merely recited this Court's formulation of the issue in *United States Department of Treasury v. Fabe*, ___ U.S. ___, 113 S. Ct. 2202 (1993) ("*Fabe*"),⁶ i.e., whether the state statute regulated policyholders and their relationship to the insurance company, and then concluded that a prohibition of sales of insurance by financial institutions fit within that description, even though the prohibition meant that there was nothing to regulate.

The Sixth Circuit in *Owensboro* held that the Kentucky statute at issue there did not regulate the business of insurance.⁷ *Owensboro*, 44 F.3d at 391-92. Unlike the

⁵ Indeed, Black's Law Dictionary draws an explicit distinction between regulation and prohibition, defining the word "prohibit" as "[t]o forbid by law; to prevent; — not synonymous with 'regulate.'" Black's Law Dictionary 1212 (6th ed. 1990) (emphasis added). If the activity is prohibited, there is nothing to regulate.

⁶ *Fabe* held that an Ohio statute regulated the business of insurance where it directed the payment of an insolvent insurer's assets to policyholders in preference to other creditors.

⁷ The *Owensboro* court considered a Kentucky "anti-affiliation" statute, Ky. Rev. Stat. Ann. § 287.030(4), which was similar to the Florida statute at issue in the present case:

(continued...)

Eleventh Circuit, the *Owensboro* court examined both the *Fabe* decision and the Court's three-part test from *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982) ("*Pireno*").⁸ It concluded that the Kentucky statute did not regulate the "business of insurance," as defined by the *Pireno* criteria, but rather *excluded* entities that were not in the "business of insurance," i.e., banks. *Id.* at 392. Stressing the distinction between regulating an entity's conduct and excluding it from engaging in any conduct at all, the *Owensboro* court held that the state statute could not preempt federal law because it failed the first prong of the McCarran-Ferguson Act test. *Id.* Section 92 thus governed under traditional federal preemption principles. *Id.*

Like the statute at issue in *Owensboro*, the Florida statute considered by the Eleventh Circuit does not seek to control or regulate the manner in which the sale of insurance is conducted. There are no licensing requirements or restrictions on the manner of sale. Rather, the Florida statute flatly bars almost all banks from the sale of insurance.

⁷(...continued)

"No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgagee in mortgage property, other than title insurance."

⁸ In *Pireno* the Court held that the three criteria for identifying the "business of insurance" for purposes of the McCarran-Ferguson Act are "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and insured; and third, whether the practice is limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129 (emphasis in original).

In its opinion below, the Eleventh Circuit did not even mention, much less seek to distinguish, *Pireno*, *Owensboro* or *Muir*.

This case thus presents the Court with an opportunity to resolve divergent interpretations of the McCarran-Ferguson Act that have created substantial confusion in the rapidly evolving and increasingly competitive financial services industry. Banks cannot determine whether to make strategic investments in insurance operations. The Eleventh Circuit's ruling, at odds with the Sixth Circuit's decision in *Owensboro* and the Third Circuit's decision in *Muir*, has introduced considerable uncertainty as to the right of banks to sell insurance pursuant to Section 92 in numerous states. The Court should grant the petition to resolve this split among the circuits before additional courts and legislatures are forced to choose sides, creating even greater uncertainty and inconsistency for banks and insurance agents across the country.

II.

The Eleventh Circuit Also Applied an Erroneous Standard to Determine Whether Section 92 Specifically Relates to Insurance Under the Second Part of the McCarran-Ferguson Test.

The Court also should grant the petition to resolve the issue whether the Eleventh Circuit properly applied the second part of the McCarran-Ferguson Act preemption test, *i.e.*, whether Section 92 specifically relates to the business of insurance. 15 U.S.C. § 1012(b). The court below failed to apply the standard developed by Congress, and instead imposed its own requirements that the federal statute must also regulate insurance or must specifically require preemption of the state statute. The Eleventh Circuit thus impermissibly altered the balance that Congress struck between federal law and state regulation of insurance.

In its effort to deny the applicability of the "specifically relates to" test of McCarran-Ferguson to Section 92, the

Eleventh Circuit focused first on a *dictum* in the *Fabe* opinion that state statutes that regulate insurance "do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." ___ U.S. at ___, 113 S. Ct. at 2211.⁹ The fatal flaw in applying "specific preemption" as a standard is that this is not what the statute says. A specific preemption requirement is included in some federal statutes, *see, e.g.*, 17 U.S.C. § 301(a) (Copyright Act of 1976); 15 U.S.C. § 1334(b) (Federal Cigarette Labeling and Advertising Act); it is conspicuous by its absence in McCarran-Ferguson.

The Eleventh Circuit then concluded that Section 92 does not "specifically require" preemption of conflicting state statutes because it does not regulate the business of insurance. Such a conclusion, however, defies plain meaning, common sense and the teachings of this Court.

Stated simply, "regulates" is not a synonym or substitute for "relates to." Although a statute which regulates a matter also relates to that matter, the converse is not true. The term "relates to" is considerably broader than "regulates," and many statutes relate to a subject without necessarily regulating it. While a statute may regulate only one line of business, the same statute may relate to other lines of business. Thus, by substituting its own wording for the language chosen by Congress, the Eleventh Circuit failed altogether to address the real issue under the statute.

The Eleventh Circuit's casual substitution of the verb "regulate" for the statutory word "relate" narrowed the category of federal statutes which satisfy the second prong of the McCarran-Ferguson Act. A statute which "regulates" an

⁹ There clearly was no issue presented in *Fabe* about whether the federal statute under consideration there related to the business of insurance. ___ U.S. at ___, 113 S. Ct. at 2208 ("The parties agree that . . . the federal priority statute does not 'specifically relate to the business of insurance'").

activity defines and shapes the conduct which comprises that activity. See *Owensboro*, 44 F.3d at 392. But as this Court's precedents establish, a statute "relates to" an activity even if it has only an indirect link to it. See *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, ___ U.S. ___, ___, 114 S. Ct. 517, 525-26 (1993); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).¹⁰

Moreover, had Congress intended for the first and second prongs of the McCarran-Ferguson test to be identical in meaning, it would have used the same term, *i.e.*, either "relates to" or "regulates," twice. Congress' use of the different terms in the same sentence clearly connotes its intention to impart different meanings.¹¹

The Eleventh Circuit's analysis of Section 92 in the context of the McCarran-Ferguson Act also merits review by the Court.

¹⁰ The Eleventh Circuit's substitute language is particularly egregious in view of this Court's conclusion that Congress' use of the word "relates" should be construed to sweep in a broad category of activities and practices. See *John Hancock Mut. Life Ins. Co.*, ___ U.S. at ___, 114 S. Ct. at 525 (holding that ERISA "obviously and specifically relates to insurance") (internal quotations omitted); *Morales*, 504 U.S. at 383 (holding that the term "relating to" in a federal statute "express[es] a broad pre-emptive purpose").

¹¹ Furthermore, even if the term Congress used in the second prong had been "regulate," Section 92 specifically regulates. For example, it explicitly calls for "rules and regulations" to be issued by the Comptroller, it provides for fees and commissions to be governed by contract, and it limits insurance sold to policies issued by companies authorized by the relevant state to conduct business.

III.

The Petition Presents Issues of National Importance to Banks, Insurance Agents, and Banking and Insurance Customers Across the Country.

National banks across the country engage in the sale of insurance pursuant to Section 92. The Office of the Comptroller of the Currency has testified that approximately 179 national banks sell insurance in reliance on this section, see *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 30-31 (E.D. Ky. 1992), *aff'd sub nom. Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), and the fees generated by the sale of insurance already are an important source of revenue for national banks, both large and small, see Yvette D. Kantrow, *Small Banks Betting on Insurance; Experience with Product Has Paid Off, Survey Finds*, *The American Banker*, Jan. 29, 1991, at 6. Banks likely would expand the services they offer their customers to include insurance sales, if a stable legal environment existed to support such expansion. See Jaret Seiberg & Karen Talley, *Dismantling Glass-Steagall: Banks Yearn to Round Out Product Lines With Insurance, But Prospects Are Unclear*, *The American Banker*, Mar. 23, 1995, at 1, 15 (reporting that a bank's profits from the sale of life insurance policies alone "could range from hundreds of thousands of dollars to millions").

But the confusion created by the current split in the circuits is a powerful disincentive to expansion of insurance services. Petitioner identifies 15 states (including Florida and Kentucky) which have enacted statutes purporting to limit the power of banks to sell insurance in communities of less than 5,000 residents. (Pet. at 6 & n.1.) In this environment, the Eleventh Circuit's decision has the effect of creating a patchwork regime, in which a bank's power to sell insurance

turns arbitrarily on whether the state falls within the jurisdiction of the Eleventh, the Sixth or another circuit court of appeals, and on whether the state has enacted or may choose to enact a statute purporting to so limit the bank's powers.

In the Sixth Circuit, the statutes enacted by Kentucky and, presumably, by Tennessee have been held preempted by Section 92, and Michigan and Ohio are unlikely to enact such legislation in the face of the *Owensboro* ruling. In the Eleventh Circuit, now that the Florida statute has been upheld, Alabama and Georgia could enact similar legislation. The fate of the laws enacted by at least ten of the 12 other states with such statutes now on the books would await a determination by the courts with jurisdiction over them.¹² National banks that wish to sell insurance pursuant to Section 92 in those states will have to file lawsuits in the appropriate federal courts. In the remaining states, financial institutions may not be barred presently from doing such business, but clearly they are deterred from offering such services by the knowledge that they will have to file and prosecute lawsuits to protect that business if a state enacts such legislation.

In all but a few states, therefore, banks may sell insurance only at their own risk. *See, e.g.,* Jaret Seiberg, *Docket: A Maze of Rulings Leaves Banks Guessing On Insurance Power*, *The American Banker*, Feb. 15, 1995, at 3 ("Until the Supreme Court decides the issue, bankers must accept that their authority to sell most insurance and annuity products is tenuous"). Needless to say, the uncertainty

¹² These states are in the First Circuit (Maine, Massachusetts, New Hampshire and Rhode Island), Second Circuit (Connecticut and Vermont), Fourth Circuit (West Virginia), Fifth Circuit (Louisiana and Texas) and the Ninth Circuit (Nevada). Presumably the Third Circuit's ruling in *Muir* would result in rulings invalidating the similar statutes enacted in New Jersey and Pennsylvania.

created by the split in the circuits will cause banks to hesitate before offering insurance products to their customers. Resolution of the split in the federal circuits would thus benefit banks, and their customers, nationwide.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUCE E. CLARK
125 Broad Street,
New York, New York 10004.
(212) 558-4000
*Counsel of Record for The New
York Clearing House Association,
Amicus Curiae*

H. Rodgin Cohen
Michael M. Wiseman
Michael E. Johnson

SULLIVAN & CROMWELL
Of Counsel

Norman R. Nelson
General Counsel
The New York Clearing
House Association
Of Counsel

July 7, 1995

In the Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,
v.

TOM GALLAGHER, Insurance Commissioner
of the State of Florida, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
AND BRIEF OF *AMICI CURIAE*
CONSUMER BANKERS ASSOCIATION, AMERICA'S
COMMUNITY BANKERS, FLORIDA BANKERS
ASSOCIATION, ARKANSAS BANKERS ASSOCIATION,
GEORGIA BANKERS ASSOCIATION, MASSACHUSETTS
BANKERS ASSOCIATION, MICHIGAN BANKERS
ASSOCIATION, NEW MEXICO BANKERS
ASSOCIATION, OHIO BANKERS ASSOCIATION,
PENNSYLVANIA BANKERS ASSOCIATION,
TENNESSEE BANKERS ASSOCIATION, VERMONT
BANKERS ASSOCIATION, WESTERN INDEPENDENT
BANKERS, FIRST INTERSTATE BANCORP
AND THE HUNTINGTON NATIONAL BANK
IN SUPPORT OF PETITIONER**

DAVID W. RODERER
Counsel of Record
ERIC L. HIRSCHHORN
DONN C. MEINDERTSMA
WILLIAM B.F. STEINMAN
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005-3502
(202) 371-5700
Counsel for Amici Curiae

Of Counsel:

MARCIA Z. SULLIVAN
CONSUMER BANKERS
ASSOCIATION

1000 Wilson Boulevard
Suite 3012
Arlington, Virginia 22209

PHILIP GASTEYER
AMERICA'S COMMUNITY
BANKERS

900 19th Street, N.W.
Suite 400
Washington, D.C. 20006

J. THOMAS CARDWELL
ACKERMAN, SENTERFITT &
EIDSON, P.A.

255 South Orange Avenue
Orlando, Florida 32802

*Attorney for Florida
Bankers Association*

ARKANSAS BANKERS
ASSOCIATION
The Carvill Building
1220 W. Third Street
Little Rock, Arkansas 72201

GEORGIA BANKERS
ASSOCIATION
50 Hurt Plaza, Suite 1050
Atlanta, Georgia 30303

MASSACHUSETTS BANKERS
ASSOCIATION
73 Tremont Street, Suite 306
Boston, Massachusetts 02108

DONALD HEIKKINEN
MICHIGAN BANKERS
ASSOCIATION

222 North Washington
Square, Suite 320
Lansing, Michigan 48933

NEW MEXICO BANKERS
ASSOCIATION
P. O. Box 90880
Albuquerque, New Mexico
87199

JEFFREY D. QUAYLE
OHIO BANKERS ASSOCIATION
27 West Broad, Suite 1001
Columbus, Ohio 43215

LOUISE A. RYND
PENNSYLVANIA BANKERS
ASSOCIATION
P.O. Box 152
Harrisburg, Pennsylvania
17108

TIMOTHY L. AMOS
TENNESSEE BANKERS
ASSOCIATION
210 Venture Circle
Nashville, Tennessee 37228

VERMONT BANKERS
ASSOCIATION
P.O. Box 587
Montpelier, Vermont 05601

WESTERN INDEPENDENT
BANKERS
100 Spear Street
Suite 1505
San Francisco, California
94105

JULIUS L. LOESER
Assistant General Counsel
FIRST INTERSTATE BANCORP
633 West 5th Street,
Suite 700
Los Angeles, California 90071

DANIEL W. MORTON
THE HUNTINGTON
NATIONAL BANK
41 S. High Street
Huntington Center 1032
Columbus, Ohio 43215

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1837

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Amici respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the petition for a writ of certiorari. Consent to file this brief has been obtained from counsel for petitioner Barnett Bank of Marion County, N.A., and from counsel for respondents Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and Florida Association of Insurance Agents.* However, counsel for respondent Insurance Commissioner of the State of Florida has declined to consent.

The petition seeks review of the determination by the United States Court of Appeals for the Eleventh Circuit

* Correspondence reflecting the consent of these parties has been filed with the Clerk of the Court.

that Florida may prohibit national banks from engaging in an activity expressly authorized by Congress—selling insurance in communities with less than 5000 inhabitants. The court of appeals' decision threatens the federally authorized ability of national banks to compete in the financial services marketplace and upsets the congressionally crafted balance between federal and state authority over national banks.

Amici have a direct interest in ensuring that national banks are permitted to continue to engage in sales of insurance to the full extent authorized by federal law. As more fully described below, *amici* are national, regional and state banking associations whose members include banks and savings associations throughout the United States. *Amici* also include financial institutions that directly or through affiliated institutions engage in the sale of insurance in small towns.

Three national and regional associations join the attached brief on behalf of their members. *Consumer Bankers Association*, *America's Community Bankers*, and *Western Independent Bankers* represent numerous national banks that engage in insurance activities in small towns as authorized by Congress. These associations and their constituent members have a direct interest in preserving these activities from restrictive and anti-competitive state laws. Other members of these associations are prevented from conducting congressionally authorized insurance activities because the laws of the states in which they operate purport to restrict those activities. Descriptions of these associations follow:

The *Consumer Bankers Association* (CBA) was founded in 1919 to provide a progressive voice for the retail banking community. CBA represents over 750 federally insured banks and thrift institutions that hold more than 80% of all consumer deposits and more than 70% of all consumer credit held by federally insured depository institutions in the United States.

America's Community Bankers (ACB) is the national trade association for over 1800 savings and community financial institutions, serving communities in every state. Members are federally and state chartered, stock and mutual in ownership, and FDIC-insured. The industry members that ACB represents have more than \$1 trillion in assets, 270,000 employees and 16,000 offices. Many of ACB's member banks have long provided the public with insurance products and services through related entities under a variety of corporate structures.

Western Independent Bankers (WIB) is the only regional multistate banking association in the United States. Its members consist of 250 independent community banks located in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming, as well as American Samoa and Guam. WIB's members account for more than \$34 billion in banking assets.

Ten statewide banking associations also join in the attached brief. Each state represented by these associations has enacted legislation purporting to prohibit or severely proscribe the ability of banks, including national banks, to market insurance products. Each state association is described below:

Florida Bankers Association (FBA) is the principal organization representing commercial banks in Florida. FBA's 321 members comprise 88% of the banks in the state, and these members hold 96% of the state's bank deposits. Legislation enacted by the State of Florida purporting to prohibit national banks from marketing insurance products in small towns is directly at issue in this case.

Arkansas Bankers Association has represented Arkansas banks and bank holding companies for 104 years. The primary objective of the Arkansas Bankers Association is to provide a forum for the financial community to address

issues of state and national importance to the business of banking so as to promote a positive banking environment for member banks and customers.

Georgia Bankers Association (GBA) is the statewide association representing commercial banks in the State of Georgia. GBA's members collectively account for virtually all of the banking assets in the state.

Massachusetts Bankers Association is a statewide association representing 192 banks and savings associations in the Commonwealth of Massachusetts. Its members account for \$150 billion in banking assets.

Michigan Bankers Association has represented Michigan commercial banks and bank holding companies for over 100 years. It represents approximately 200 commercial banks in Michigan, which collectively account for virtually all of the banking assets in the state.

New Mexico Bankers Association (NMBA) is the principal state trade association for the banking community in New Mexico. Its membership consists of 69 banks and savings institutions, which collectively account for over 90% of banking assets in New Mexico.

Ohio Bankers Association is the principal state trade association representing virtually all of the commercial banks in Ohio. Its members range in size from small community banks to large regional institutions.

Pennsylvania Bankers Association (PBA) is the trade association representing approximately 250 commercial and savings banks in the commonwealth of Pennsylvania. PBA's members hold 99% of the commercial banking assets in Pennsylvania.

Tennessee Bankers Association (TBA) is the principal trade association for commercial banks, savings banks, savings and loans and trust companies in Tennessee. All 249 state and federally chartered banks and trust companies and all 27 state and federally chartered savings institutions in Tennessee are members of TBA.

Vermont Bankers Association (VBA) represents 28 commercial banks and savings associations in Vermont. VBA provides legislative, regulatory and educational services to its members.

In addition to the above-named banking associations, *First Interstate Bancorp* and *The Huntington National Bank* join the attached brief as *amici*. These institutions have a direct interest in exercising the full range of powers granted to national banks by Congress.

First Interstate Bancorp is headquartered in Los Angeles, California, and operates 14 subsidiary banks with 1167 branches in 13 western States. It has total assets of \$56.9 billion.

The Huntington National Bank is a national bank headquartered in Columbus, Ohio, with banking offices throughout the state of Ohio. It is the principal banking subsidiary of *Huntington Bancshares Incorporated*, a \$19.4 billion bank holding company with bank and non-bank subsidiaries located in several mid-western states and Florida.

For the foregoing reasons, the motion by *amici* for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

DAVID W. RODERER

Counsel of Record

ERIC L. HIRSCHHORN

DONN C. MEINDERTSMA

WILLIAM B.F. STEINMAN

WINSTON & STRAWN

1400 L Street, N.W.

Washington, D.C. 20005-3502

(202) 371-5700

Counsel for Amici Curiae

July 7, 1995

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BRIEF IN SUPPORT OF PETITIONER
FILED BY *AMICI CURIAE*
CONSUMER BANKERS ASSOCIATION, *ET AL.*

National banks are instrumentalities of federal law, governed by a comprehensive federal regulatory scheme. Congress initiated the modern national banking system in the National Bank Acts of 1863 and 1864, which, *inter alia*, granted national banks the right to engage in the "business of banking" and such other activities as are incidental thereto. 12 U.S.C. § 24 Seventh (1994). Congress empowered the Comptroller of the Currency, a bureau of the United States Department of the Treasury, to charter national banks and regulate their activities. National banks derive their powers exclusively from the National Bank Act and other federal statutes.

This case raises important issues concerning whether a state may deny national banks their authority, expressly granted by Congress, to broker and sell insurance products. The Court of Appeals for the Eleventh Circuit ruled that Florida may prohibit petitioner Barnett Bank from selling insurance products, even though 12 U.S.C. § 92 authorizes the bank to do so. The court of appeals' decision threatens the federally endowed authority of national banks to compete in the financial services marketplace and upsets the congressionally crafted balance between federal and state authority over national banks. Moreover, the decision conflicts with the decisions of other courts. Because the decision has far reaching, adverse ramifications for the banking industry and for consumers, *amici* join petitioner in urging this Court to review and reverse the decision of the court of appeals, and to so restore to national banks their power to engage in the full range of activities permitted by Congress and the Comptroller of the Currency.

INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici curiae* are detailed in the accompanying Motion. Briefly, *amici* are national and state banking associations whose members include banks and savings associations throughout the United States, as well as certain financial institutions which have or are national bank subsidiaries. *Amici* have a direct and substantial interest in ensuring that national banks are permitted to continue to engage in the sale of insurance products to the full extent authorized by federal law. The decision of the court of appeals below threatens this interest.

REASONS FOR GRANTING THE WRIT

In the early days of the Republic, this Court ruled that pursuant to "the great powers" of the Constitution, including the power to borrow money and the power to regulate commerce, Congress may charter banks. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). Absent express authorization from the Congress, "the States have not power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.* at 436. State exercise of concurrent regulatory authority over the activities of national banks is forbidden if the state law is "in conflict with some Act of Congress, or . . . tends to impair or destroy the utility of such banks, as agents or instrumentalities of the United States, or interferes with the purposes of their creation."¹

This case poses the significant question whether states may proscribe national banks from executing a power expressly granted by Congress—the power to broker and sell insurance. In 1916 Congress provided that any national bank doing business in a location with 5000 or fewer residents may "act as the agent for any . . . insurance company . . . by soliciting and selling insurance and collecting premiums on policies" issued by insurance companies. Act of Sept. 7, 1916, c. 461, 39 Stat. 753 (current version at 12 U.S.C. § 92 (1994)) ("Section 92").² Congress granted this statutory power to provide

¹ *Waite v. Dowley*, 94 U.S. 527, 533 (1877). This Court has articulated this basic formulation numerous times. See, e.g., *Davis v. Elmira Sav. Bank*, 161 U.S. 275 (1896); *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233, 248 (1944).

² This Court recently resolved a controversy over the continuing vitality of Section 92 by determining that the provision has not been repealed. *United States Nat'l Bank v. Independent Ins. Agents, Inc.*, 113 S. Ct. 2173 (1993).

consumers convenient access to insurance through local banks, particularly in small and underserved communities, as well as to provide an additional source of revenue for banks. *Independent Ins. Agents of Am. v. Ludwig*, 997 F.2d 958, 960 (D.C. Cir. 1993) (citing 53 Cong. Rec. S11,001 (1916) (letter from Comptroller of the Currency J. Skelton Williams)).³ Today Section 92 promotes robust competition in the sale of insurance policies by authorizing national banks to act as insurance agents in small towns.

Florida and several other states, however, have enacted so-called anti-affiliation laws that prohibit national banks from selling insurance products, see Petition of Barnett Bank ("Petition"), at 6 & n.1, and have thereby thwarted the congressional purpose underlying Section 92. The Florida law at issue in this case provides that "[n]o insurance agent . . . who is associated with . . . a financial institution shall engage in insurance activities." Fla. Stat. Ann. § 626.988(2) (West 1994) (quoted in full at page 4 of the Petition). Under traditional preemption analysis, Section 92 would preempt the squarely conflicting Florida statute. *E.g.*, *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954) (power implicit under the federal banking laws for banks to use word "savings" in advertising preempts New York law prohibiting use of that term); *Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982) (California law prohibiting due-on-sale clause in loan instruments preempted by federal law permitting same).

The court of appeals held in this case, however, that Florida's anti-affiliation law escapes preemption by virtue

³ Comptroller Williams advised the Senate Banking and Currency Committee that giving national banks doing business in small towns the power to act as general insurance agents would provide banks with "additional sources of revenue to put them in a position where they could better compete with local State banks and trust companies." 53 Cong. Rec. S11,001 (cited in *Ludwig*, 997 F.2d at 960).

of Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988), which provides that federal law does not impair state laws that regulate the business of insurance unless the federal law "specifically relates to the business of insurance."⁴ Congress enacted the McCarran-Ferguson Act after this Court ruled that the Sherman Act extends to the business of insurance and that such coverage is authorized under the Commerce Clause. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).⁵ Congress' purpose was to ensure that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation" of the insurance business by the states. 15 U.S.C. § 1011 (1988) (emphasis added). Section 2(b) accordingly provides that federal laws will preempt state insurance regulations if the former "specifically relate[] to the business of insurance." 15 U.S.C. § 1012(b). Given Congress' specific concerns that congressional silence should not by mere implication disrupt state regulation of the business of insurance,⁶ the McCarran-Ferguson Act does not save the Florida statute from preemption since the federal law at issue here, Section 92, is far from silent on the subject. Nevertheless, agreeing with Florida's Insurance Commissioner and allied insurance agent interests,⁷ the court of

⁴ "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." *Id.*

⁵ Before 1944 it was generally believed that the issuance of an insurance contract was not a transaction in "commerce." See, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).

⁶ *Infra* at 11-13 and n.11.

⁷ The Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and the Florida Association of Insurance Agents intervened in the proceedings below. As a result of the court of appeals' decision, members of these associations no longer face competition from national banks in the sale of insur-

appeals held that petitioner Barnett Bank, a national banking organization, could not carry out the powers explicitly granted to it by federal law to market insurance products.

This Court should review and reverse the decision below. First, the erroneous decision by the court of appeals, in conflict with other recent decisions,⁸ anti-competitively curtails the ability of national banks to engage in an activity explicitly authorized by Congress, to the significant detriment of consumers and the market. Second, the decision below improperly reconciles two important federal statutory schemes—the National Bank Act, including amendments by the Federal Reserve Act, and the McCarran-Ferguson Act. Finally, this case raises significant questions about the proper interpretation of the McCarran-Ferguson Act.

ance products. See *Interstate Banking and Insurance Activities of National Banks: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 1st Sess. 95 (Oct. 5 and Nov. 3, 1993) (statement of Robert J. Hunter, President of the National Insurance Consumer Organization) ("Banks are a logical source of insurance. Sales outlets in banks would be convenient for consumers and should be extremely efficient points for sale. The incredible reaction of insurance agents against bank entry is due in the main to their inefficiency and high costs.").

⁸ The Sixth Circuit recently held that Section 92 preempts a Kentucky law purporting to limit the power of national banks to sell insurance products. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) (Kentucky law not enacted for purpose of regulating business of insurance); Pet. App. 39a-64a. In another recent case, the Louisiana state courts ruled that Section 92 does not preempt a state law forbidding national banks in small towns from selling insurance. *First Advantage Ins., Inc. v. Green*, 652 So. 2d 562 (La. Ct. App.), cert. denied, 654 So. 2d 331 (La. 1995), pet. for cert. filed, Case No. 94-2130 (U.S. Sup. Ct., June 27, 1995). Amici expect that, as in the *First Advantage* case, a petition for review by this Court of the *Owensboro* decision will soon be filed. See Petition at 17.

I. THE DECISION BELOW THWARTS THE EXPRESS CONGRESSIONAL AUTHORIZATION FOR NATIONAL BANKS TO ENGAGE IN INSURANCE ACTIVITIES AND WILL SEVERELY IMPAIR COMPETITION.

The court of appeals' error deprives consumers, banks, and insurance companies alike of the benefits intended by Congress to be provided through federally authorized sales by national banks of insurance and related products. As recently acknowledged by this Court, ongoing changes in the financial services industry among products and distribution systems have resulted in heightened competition among banks and other nonbank purveyors of financial products and services. *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813-14 (1995). The erroneous ruling of the appeals court in this case would arbitrarily restrain such natural market developments and deny consumers the benefits thereof, by reinforcing artificial state law barriers in a manner not contemplated by or consistent with the relevant federal laws.

The decision below would largely restrict consumer options in the purchase of insurance products to less convenient and more costly sources. According to a study by the Federal Reserve Bank of Boston, bank participation in the insurance market can "keep costs down and increase customer convenience." Steven D. Felgran, *Banks as Insurance Agencies: Legal Constraints and Competitive Advances*, New Eng. Econ. Rev., Sept.-Oct. 1985, at 34, 37. More recently, the General Accounting Office likewise concluded that participation by banks in this market reduces consumers' costs of purchasing insurance. See *Interstate Banking and Insurance Activities of National Banks: Hearings Before the Sen. Comm. on Banking, Housing and Urban Affairs*, 103d Cong., 1st Sess. 96 (1993) ("House Hearings") (citing United States General Accounting Office, Report to the Chairman, Comm. on Small Business, House of Representa-

tives, *Bank Powers—Issues Relating to Banks Selling Insurance* (1990) (“GAO Report”). Moreover, demonstrating the significant economic consequences of the issues presented here, a study by the Consumer Federation of America concluded that full-fledged bank participation in life insurance sales will save consumers five to ten billion dollars annually. House Hearings at 95; *see also id.* at 125 (consumers have benefitted from the “market presence of banks” in the sale of insurance); *id.* at 198 (statement of Frank N. Newman, Under Secretary of the Treasury) (bank sales of insurance offer consumers greater convenience and lower prices, which “may be most important to consumers and small businesses in remote areas or low-income communities”). Without citing any evidence that Congress intended national bank powers in this arena to yield to the contrary wishes of the states, the court of appeals’ decision would remove national banks in its jurisdiction from this market to the detriment of consumers.

At the same time, bank participation in the distribution of insurance enhances the safety and soundness of the banking system. *E.g.*, GAO Report at 5 (insurance sales commissions could “strengthen safety and soundness and protect against bank failures”); *see also* House Hearings at 96-97; *id.* at 47 (statement of Eugene A. Ludwig, Comptroller of the Currency) (“The sale of insurance poses very little risk to national banks.”). As the Comptroller has testified, if banks are to continue to play their “essential roles” in the economy and to remain financially strong, they “must be given a fair opportunity to compete with other providers of financial services.” *Id.* at 47. Particularly in small towns, banks “serve as poles of economic development.” *Id.*

The permissible range of national bank powers is for Congress to delineate, and this case does not call upon the Court to expand or circumscribe bank powers but rather to give effect to those powers expressly provided by Con-

gress. Congress long ago made the cogent determination: banks doing business in small towns are authorized—for the benefit of consumers and financial institutions—to act as agents for insurance companies in sales of their products. 12 U.S.C. § 92. The decision of the court of appeals to defer to contrary state law thwarts this congressional policy and should be reversed by this Court.

II. THIS COURT SHOULD ADDRESS WHETHER ACTIVITIES SPECIFICALLY AUTHORIZED FOR NATIONAL BANKS BY THE FEDERAL BANKING STATUTES MAY BE PROHIBITED BY THE STATES PURSUANT TO GENERAL LANGUAGE IN THE McCARRAN-FERGUSON ACT.

This case presents the important question whether Congress, in enacting the McCarran-Ferguson Act in 1945, intended to authorize the states to nullify express powers that Congress granted to national banks nearly three decades earlier. Guidance by this Court is needed, both for the lower courts and the banking industry, regarding the scope of state authority over national bank participation in insurance activities.

1. The powers of national banks are in the first instance for Congress and the Comptroller of the Currency to determine. *NationsBank*, 115 S. Ct. at 813-14.⁹ As a general proposition, “any attempt by a State to define [national banks’] duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank.” *First Nat’l Bank v. California*, 262 U.S. 366 (1923). As this Court made clear nearly a century ago:

⁹ Indeed, the Comptroller has discretion to authorize other financial and related activities for national banks beyond those expressly enumerated by the federal banking statutes. *Id.* at 814 n.2 (discussing 12 U.S.C. § 24 Seventh).

National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896) (holding that while national banks may remain subject to "general and undiscriminating state laws," federal law governing distribution of assets of insolvent national bank preempts contrary New York law).

Congress has explicitly subjugated certain aspects of banking operations, by both national and state chartered banks, to state control. Bank branching is a notable example: the McFadden Act authorized national banks to establish branches to the same extent that state laws permit state chartered banks to do so. 12 U.S.C. § 36 (1994). Congress has similarly provided that state laws limiting interest rates apply to national banks located in those states. 12 U.S.C. § 85 (1994). Again, Section 11(k) of the Federal Reserve Act, which was enacted only three years before the small town insurance provision in Section 92, authorizes national banks to act "as trustee, executor, administrator, or registrar of stock and bonds," so long as such authorization "is not in contravention of State or local law." 12 U.S.C. § 92a (1994).¹⁰

¹⁰ See also, e.g., 12 U.S.C. § 24 Eighth (1994) (permitting charitable contributions by national banks unless state law prohibits such contributions by state banking institutions); and 12 U.S.C. § 90

Thus, where Congress intends to permit state law limitations on federally created powers, it does so expressly and ought not to be thought to do so by implication. See *Franklin Nat'l Bank*, 347 U.S. at 378 & n.7 (no finding of congressional intent to subject a "phase of national banking to local restrictions" by implication, where Congress had done so "by express limitation in several other instances").

Section 92 grants specific insurance agency powers to national banks, but it acknowledges *no* authority in the states to limit those powers. Indeed, the specific language of the statute grants to the Comptroller the authority to regulate the agency activities of national banks, while leaving to the states the licensing of insurance companies. Given that Congress has elsewhere employed express statutory language where it wishes to permit state regulation of the activities of national banks, Congress should not be presumed to have upset the balance between federal and state authority through the general language of Section 2(b) of the McCarran-Ferguson Act. This important point should be addressed by this Court.

2. In addition to the conflict in the circuits noted above, see *supra* footnote 8, the courts of appeals have reached conflicting conclusions as to whether the McCarran-Ferguson Act applies to national banks. The United States Court of Appeals for the Eighth Circuit has ruled that that Act "was not directed at the activities of national banks" at all. *First Nat'l Bank of Eastern Ark. v. Taylor*, 907 F.2d 775, 779 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990). That court held that Arkansas could not prohibit a national bank from entering into debt cancellation contracts. The court explicitly rejected Arkansas' invocation of the McCarran-Ferguson Act, reasoning that the Act had been passed only to

(1994) (national banks permitted to give security for deposits by state or political subdivisions to the extent authorized by state law).

preserve traditional state regulation of insurance companies and to provide insurers with a partial exemption from the antitrust laws in reaction to this Court's decision in *South-Eastern Underwriters*. The *Taylor* ruling underscored that, well before *South-Eastern Underwriters*, "regulation of national banks was within the exclusive domain of the federal government." *Id.* at 780. This fact, the court reasoned, "strongly indicates" that Congress did not intend to permit state power over insurance activities to "encompass lawful activities of national banks." *Id.*; see also *United Serv. Automobile Ass'n v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986) (state anti-affiliation law not within scope of McCarran-Ferguson because, *inter alia*, "banks are not entities within the insurance industry"), *cert. denied*, 479 U.S. 1031 (1987).

In the immediate case, by contrast, the court of appeals exalted the general language of the McCarran-Ferguson Act over the detailed framework of the national banking statutes. Congress passed the McCarran-Ferguson Act to ensure that federal statutes did not by *mere implication* interfere with the state regulation of the business of insurance.¹¹ Here, the court of appeals conversely applied

¹¹ During Senate floor consideration of the McCarran-Ferguson legislation, Senator Ferguson stated that the "specifically relates to" language of Section 2(b) was to ensure that federal legislation have preemptive force only if it does more than relate to interstate commerce in general:

What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance. We wanted to be sure that the Congress, in its wisdom, would act specifically *with reference to insurance* in enacting the law.

91 Cong. Rec. 1487 (1945) (emphasis added), quoted in *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2211 n.7 (1993). What Congress sought to assure was that "no existing law and

the general language of Section 2(b) to deprive national banks of express statutory authority to market insurance products in small towns. This Court should resolve whether the general provisions of the McCarran-Ferguson Act may overcome express congressional grants of power to national banks.

3. The decision below also conflicts with this Court's recent holding that the judgment of the Comptroller, who "bears primary responsibility" for regulating the activities of national banks, must be given "controlling weight" where Congress has not spoken directly to an issue. *NationsBank*, 115 S. Ct. at 813-14 (citing *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). The Comptroller has determined, unlike the court of appeals, that states may *not* curtail insurance powers granted by Congress to national banks:

A long line of [Comptroller] precedent letters and case law stand for the proposition that national banks derive their powers from federal law, and that state limitations imposed on those powers, to the extent they are in conflict with the federal authorization, are preempted. . . . [I]nsurance activities which are permitted to national banks pursuant to federal law cannot be prohibited by state law.

Letter from William P. Glidden, Office of the Comptroller of the Currency, to John L. Primmer (Feb. 14, 1991) (attached hereto as Appendix A). In addition to conflicting with the text of Section 92, the court of appeals' decision conflicts with, and purports to supplant, the Comptroller's reasoned position on the issue.

no future law should, *by mere implication*, be applied to the business of insurance" simply because the law related to commerce. *Id.* (statement of Sen. O'Mahoney) (emphasis added). Senator Ferguson confirmed the accuracy of this statement. *Id.*

III. THIS COURT SHOULD CLARIFY THE STANDARD FOR DETERMINING WHETHER AN ACT OF CONGRESS "SPECIFICALLY RELATES" TO THE BUSINESS OF INSURANCE WITHIN THE MEANING OF SECTION 2(B) OF THE McCARRAN-FERGUSON ACT.

Addressing the ability of the states to prohibit national banks from exercising their powers under Section 92, the Louisiana Court of Appeals recently noted that the "Supreme Court has not been explicit on how specific a [federal] statute must be to preempt a state law which regulates the business of insurance." *First Advantage Ins., Inc. v. Green*, 652 So. 2d 562, 573 (La. Ct. App.), cert. denied, 654 So. 2d 331 (La. 1995), pet. for cert. filed, Case No. 94-2130 (U.S. Sup. Ct., June 27, 1995). There, the lower state court, echoing the ruling by the appeals court in this case, made the counter-intuitive determination that Section 92, although expressly empowering national banks to sell insurance, does not "specifically relate[] to . . . insurance." The Louisiana Supreme Court thereafter declined to review that ruling. Again, such clearly erroneous, yet infectious, reasoning makes a compelling case for clarification by this Court of the standard under Section 2(b).¹²

¹² This Court's decision in *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), did not address the issue because "[t]he parties agree[d] . . . that the federal priority statute does not 'specifically relat[e] to the business of insurance.'" *Id.* at 2208 (third alteration in original). In *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 525 (1993), this Court noted without elaboration that ERISA does specifically relate to the business of insurance. In *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), the majority declined to decide whether Title VII of the Civil Rights Act of 1964 "specifically relate[d]" to the business of insurance and accordingly preempted state law. *Id.* at 1088 n.17. Dissenting, Justice Powell invoked Section 2(b) as a basis for concluding that Title VII did not preempt state insurance regulation. *Id.* at 1099-1103 & nn. 5-6. The present case provides this Court with an oppor-

Under a straightforward reading of Section 2(b), Section 92 preempts the conflicting Florida law inasmuch as Section 92 explicitly authorizes insurance sales by national banks and must thereby "specifically relate[]" to the business of insurance." In ordinary parlance, "specifically relates" means no more than that the law refers in some explicit sense to or has a connection with that subject. "The ordinary meaning of ['relating to'] is a broad one—to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with." *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary*); see also *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995) ("in the normal sense of the phrase," the term "relates to" means "has a connection with or reference to") (quoting *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983)). Section 92 speaks directly and unambiguously to the business of insurance, and its relation to that business is not "by mere implication." Any such congressional concern embodied in the McCarran-Ferguson Act—*i.e.*, that the federal laws not be construed by mere implication to override state law—has no bearing on this case.

The decision below thus carries the reach of the McCarran-Ferguson Act far beyond what Congress intended, and in a way that would anti-competitively curtail essential authority explicitly vested by Congress in national banks to sell insurance products. This Court should clearly delineate the limits of Section 2(b) with regard to the insurance-related sales activities of national banks.

tunity to establish a standard for the proper interpretation of Section 2(b)'s "specifically relates to" provision.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the petition for a writ of certiorari. The decision below conflicts with those of, *inter alia*, the Sixth Circuit in the *Owensboro National Bank* case and the Eighth Circuit in the *Taylor* case, *see* S. Ct. R. 10.1(a), and presents important questions of federal law that should be settled by this Court, *see* S. Ct. R. 10.1(c).

Respectfully submitted,

DAVID W. RODERER
Counsel of Record
 ERIC L. HIRSCHHORN
 DONN C. MEINDERTSMA
 WILLIAM B.F. STEINMAN
 WINSTON & STRAWN
 1400 L Street, N.W.
 Washington, D.C. 20005-3502
 (202) 371-5700
Counsel for Amici Curiae

July 7, 1995

APPENDIX

[LOGO]

Comptroller of the Currency
 Administrator of National Banks

Washington, D.C. 20219

February 14, 1991

John L. Primmer
 Primmer and Wilson
 12 Prospect Street
 P.O. Box 159
 St. Johnsbury, VT 05819

Dear Mr. Primmer:

This is in response to your letter of January 18, 1991, requesting confirmation of your understanding that First Brandon National Bank, Brandon, Vermont, a national bank located in a town of under 5,000 population, may engage in insurance agency activities on behalf of fire, life and other insurance companies authorized to do business in the State of Vermont, notwithstanding a state statute which purports to limit the insurance activities of lending institutions (including national banks).

A long line of OCC precedent letters and case law stand for the proposition that national banks derive their powers from federal law, and that state limitations imposed on those powers, to the extent they are in conflict with the federal authorization, are preempted. In addition to the small town insurance agency permission contained in 12 U.S.C. § 92, national banks by federal statute, OCC interpretation and case law are permitted to engage in various credit-related insurance activities (underwriting and selling credit life, health and accident insurance are examples). You specifically mention debt cancellation contracts and the sale of annuities, which have been approved by the OCC for national banks.

I agree with your conclusion that insurance activities which are permitted to national banks pursuant to federal law cannot be prohibited by state law. The most fulsome, recent discussion of this general issue in the insurance business context is contained in OCC Chief Counsel Paul Allan Schott's letter of October 30, 1990, to the Louisiana Insurance Commissioner, cited in your letter. As you will note, the position there stated is that a national bank can engage in small town insurance agency activities pursuant to 12 U.S.C. § 92, notwithstanding state law prohibitions on such activity. The McCarran-Ferguson Act does not authorize a state to bar national banks from conducting insurance agency activities in that state which are authorized by federal law. At most, national banks may be subject to state regulations affecting the way they do the business; they cannot be prohibited, through licensing laws or otherwise, from engaging in the business at all. An example mentioned in the Schott letter of a permissible state regulation is one which limits the amount of premium which may be charged to the consumer. This would not conflict with the national bank's federal authorization to sell the insurance product.

I trust this reply is responsive to your inquiry.

Very truly yours,

/s/ William B. Glidden
WILLIAM B. GLIDDEN
Assistant Director
Legal Advisory Services Division

(S)

No. 94-1837

Supreme Court, U.S.

FILED

JUL 7 1995

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

TOM GALLAGHER, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, ET AL.,

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE AMICI CURIAE
AMERICAN BANKERS ASSOCIATION, ET AL.,
IN SUPPORT OF PETITIONER

JOHN J. GILL III

Counsel of Record

MICHAEL F. CROTTY

MATHEW H. STREET

AMERICAN BANKERS ASSOCIATION

1120 Connecticut Avenue, N.W.

Washington, D.C. 20036

(202) 663-5026

Attorneys for Amici Curiae

July 7, 1995

*Complete list of sponsoring organizations and counsel
appear on inside cover.

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JAMES T. MCINTYRE
THE MCNAIR LAW FIRM
1155 15th Street, N.W.
Washington, D.C. 20005
(202) 659-3900
*Attorney for Association of
Banks in Insurance*

RICHARD M. WHITING
THE BANKERS ROUNDTABLE
805 15th Street, N.W.
Washington, D.C. 20005
(202) 289-4322

LEONARD J. RUBIN
BRACEWELL & PATTERSON
2000 K Street, N.W.
Washington, D.C. 20006
(202) 828-5800
*Attorney for Independent
Bankers Association of America*

GERALD M. NOONAN
CONNECTICUT BANKERS
ASSOCIATION
450 Church Street
Hartford, CT 06103
(203) 527-5161

THOMAS H. RISTINE
ICE MILLER DONADIO & RYAN
One American Square
Indianapolis, IN 46282
(317) 236-2100
*Attorney For Indiana
Bankers Association*

MARY E. ARCENEUX
LOUISIANA BANKERS
ASSOCIATION
P.O. Box 2871
Baton Rouge, LA 70802
(504) 387-3282

McKINLEY W. DEAVER
B. CLINT GARDNER
MISSISSIPPI BANKERS
ASSOCIATION
P.O. Box 37
Jackson, MS 39205
(601) 948-6366

DAVID L. GLASS
NEW YORK STATE BANKERS
ASSOCIATION
485 Lexington Avenue
New York NY 10017
(212) 949-1184

QUESTIONS PRESENTED

1. Whether a federal statute that gives a national bank operating in a town with a population not exceeding five thousand the right to sell insurance (12 U.S.C. § 92) preempts a state law that prohibits such a bank from selling insurance.
2. Whether a state law prohibiting banks from selling insurance is a law enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).
3. Whether 12 U.S.C. Section 92 is an "Act [that] specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 94-1837

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

TOM GALLAGHER, INSURANCE COMMISSIONER
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Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF OF THE AMICI CURIAE
AMERICAN BANKERS ASSOCIATION, et al.,
IN SUPPORT OF PETITIONER

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioner in accordance with the provisions of Rule 37.2 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The American Bankers Association, Association of Banks in Insurance, The Bankers Roundtable and the Independent Bankers Association of America are national trade associations of the commercial banking industry that, collectively, represent very nearly every banking institution in the country. All of the associations frequently appear in litigation on matters of concern to their respective members. The question of the extent to which banks may participate in an entire line of business specifically made available to them by statute self-evidently fits within the interests of the associations.

The Connecticut, Indiana, Louisiana, Mississippi and New York State Bankers Associations are trade associations for the commercial banking industry within their respective states. Each of them has appeared as amicus curiae in litigation over the insurance or annuity sales powers of commercial banks, either in this Court or in federal or state courts in their respective jurisdictions.

This is one of at least five cases¹ now pending before

¹ The others include *Owensboro National Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994); *First Advantage Insurance v. Green*, 652 So. 2d 562 (La. Ct. App. 1995), application for writ of certiorari or review denied, No. 95-C-0820 (La., May 5, 1995), petition for cert. filed, 63 U.S.L.W. ____ (U.S. June 17, 1995) (No. 94-2130); *NBD Bank, N.A. v. Bennett*, 874 F. Supp. 927 (S.D. Ind. 1994), appeal pending, No. 95-1310 (7th Cir.); and *Shawmut Bank*

courts around the country that explore the extent of the powers, if any, of state insurance commissioners to limit the exercise of otherwise lawful authority of national banks. Under familiar precepts of Supremacy Clause law, a federal statute ordinarily preempts any contrary state law. But in most of these cases, insurance commissioners and/or their constituent insurance agent trade associations maintain that plenary authority to regulate insurance is preserved for the states by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1012. The McCarran-Ferguson Act provides that federal law does not invalidate, impair or supersede a state law enacted for the purpose of regulating the business of insurance unless the federal law in question specifically relates to the business of insurance.

Your amici, on behalf of their respective members, suggest that

(1) so-called "anti-affiliation" statutes, including the Florida statute at issue here, now in effect in a number of states, are not state laws enacted for the purpose of regulating the business of insurance, but rather are enacted to regulate or prohibit a portion of the business of banking;

(2) the federal law in question here can co-exist with, and therefore not "invalidate, impair or supersede," those state laws that--unlike the anti-affiliation statute in this case--really do regulate the business of insurance; and

Connecticut, N.A. v. Googins, No. 3:94 CV 146 (RNC) (D. Conn.).

(3) the federal law in question here, 12 U.S.C. § 92, is a law that "specifically relates to," though it does not and need not "regulate," the business of insurance (It actually uses the word "insurance" five times). To the extent that Section 92 is inconsistent with state law, it is, therefore, entitled to preemptive effect.²

The Eleventh Circuit below got it wrong, and in doing so acted at odds with the great weight of precedent, both of this Court and of sister Circuits.

REASONS FOR GRANTING THE WRIT

I. The Conflicts Among the Circuits

The Petition for Writ of Certiorari filed in this case correctly points out that there is a "square conflict" between the decision of the Eleventh Circuit below and a contemporaneous decision by the Sixth Circuit, *Owensboro National Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), a conflict in need of resolution by this Court so as to restore uniformity of interpretation and application of a federal

² When it suits their purposes, the Florida Respondents actually agree that "under the Supremacy Clause, any Florida law in conflict with 12 U. S. C. § 92 would be preempted." **Answer Brief and Appendix of Appellees, State of Florida, Department of Insurance, and Florida Association of Insurance Agents, and Amicus Curiae Florida Association of Life Underwriters, Glendale Federal Savings and Loan Association v. State of Florida, Department of Insurance**, Case No. 88-2266 (Fla. App. 1st Dist.), January 13, 1989, at 29.

statute that is of increasing importance to the development of a modern financial structure in the United States. Your amici obviously concur in the argument set forth in the Petition, but appear here to carry the analysis a step further.

The Sixth Circuit opinion is only the most obvious instance in which other courts have reached results irreconcilable with that of the court below. In *Owensboro*, as here, a national bank alleged that Section 92 of the National Bank Act (12 U.S.C. § 92), which specifically grants to national banks located and doing business in small towns the affirmative statutory right to act as insurance agent, preempted a state anti-affiliation statute that prohibited banks from so acting. As here, the insurance commissioner claimed that the state law was saved from preemption by the McCarran-Ferguson Act. Nonetheless, the court held that the McCarran-Ferguson Act did not apply. It saved only those state laws enacted for the purpose of regulating the business of insurance, whereas the Kentucky law in question determined who could or could not engage in the business of insurance: "Excluding a person from participation in an activity, however, is different from regulating the manner in which the activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity." *Owensboro, id.*, 44 F.3d at 392. Here, the Florida law in question says nothing about how Barnett Bank of Marion County's insurance agency activities are to be conducted. If the Commissioner has his way here, there will be no such activity to regulate at all. Nevertheless, the Eleventh Circuit below held that the Florida law excluding the Bank from the insurance agency business regulated "the business of insurance" because it regulated "the relationship between

insurers and potential policyholders." *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir. 1995) (Pet. App. A, at 11a).

Besides the Sixth Circuit, the Third, Fourth, Fifth, Eighth, and Ninth federal circuits all take a different view from the court below:

○ In *United Services Automobile Association v. Muir*, 792 F.2d 356 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), a nationwide insurance underwriter acquired a savings bank in Texas. As a result, the Insurance Commissioner of Pennsylvania sought to compel either a divestiture of the savings bank or a revocation of the company's license to do business in Pennsylvania. Section 641 of the Pennsylvania Insurance Department Act (40 P.S. § 281) prohibited affiliations between insurance companies and financial institutions. USAA filed suit challenging the Commissioner's actions. The district court abstained, concluding that the McCarran-Ferguson Act gave states exclusive control over regulation of the business of insurance.

On appeal, the Third Circuit reversed. Despite the fact that the Pennsylvania anti-affiliation statute was located in the insurance code, as is the Florida law, the court found that the purpose of the legislature was not to regulate the business of insurance, but rather "to prevent competition between insurers and Pennsylvania financial institutions."

Id. at 364. Moreover, applying the Supreme Court's *Pireno*³ test, the court found that the Pennsylvania law was not concerned with the transferring or spreading of the policyholder's risk; that affiliations between insurers and banks had no integral connection to the relationship between the insurer and the insured; that the reach of the McCarran-Ferguson Act was limited to entities within the insurance industry; and that banks were not within that industry--even those that were affiliated with insurance companies. *Id.* Consequently, the court found that the McCarran-Ferguson Act did not apply.

The relevant Florida statute here is substantively identical to the Pennsylvania statute but the Eleventh Circuit found its purpose to be the protection of consumers from "the loss of arms-length transactions and objectivity when the bank becomes involved with insurer and insured."⁴ *Barnett, id.* 43 F.3d at 636 (Pet. App. A, at 12a).

○ In *Tri-State Machine, Inc. v. Nationwide Life Insurance Co.*, 33 F.3d 309 (4th Cir. 1994), the court dealt with an ERISA preemption issue. Like the McCarran-Ferguson Act, the Employee Retirement Income Security Act

³ *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982).

⁴ This despite the fact that impartial surveys show that banks have better sales practices than insurers. *See Scism, Many Life Insurance Agents Don't Know Enough About Their Clients, Study Says*, Wall Street Journal, May 9, 1995 at B12.

saves from preemption (by ERISA) state laws that regulate the business of insurance. The West Virginia Unfair Trade Practices Act, found in the Insurance chapter of the state code, proclaimed that its purpose was to regulate the business of insurance within the meaning of the McCarran-Ferguson Act, so as to escape federal preemption. The Florida law is to virtually identical effect. *See Fla. Stat. ch. 626.951(1)*. The West Virginia law set forth a "list of prohibited acts in the marketing, selling and administering of insurance in West Virginia." *Tri-State*, 33 F.3d at 314. Nevertheless, the Fourth Circuit held that the Act did not regulate the business of insurance and was not saved from preemption:

[T]his type of regulation is not unique to the business of insurance, and it does not target, at least in these provisions, the core business of insurance which involves contracts of protection under which risk is spread among policy holders. *Id.*

Here, Barnett Bank of Marion County, through its subsidiary Linda Clifford Agency, acts as an insurance agent, not an underwriter. It does not itself enter into any contracts of protection under which risk is spread among policy holders. Those contracts are entered into, if at all, between policy holders and insurance companies.⁵ Thus,

⁵ An insurance *agent* is not a party to the relationship between an insurance *company* and a policyholder. The agent merely serves to bring those two parties together, much as a real estate agent or a securities broker bring buyers and sellers together without becoming a principal.

Barnett Bank of Marion County is not and will not be engaged in the "core business of insurance," the regulation of which is the only thing preserved from federal preemption according to the Fourth--but not the Eleventh--Circuit.

○ In *Cochran v. Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979), the federal Truth in Lending Act was found to be applicable to the activities of a company licensed by the Georgia Insurance Commissioner to finance premiums for purchasers of automobile insurance. Despite licensing and regulation of the company by an insurance commissioner and despite the company's capacity to cancel an insurance policy upon default by the borrower-policyholder, Georgia's laws concerning the company's operations were held not to constitute the regulation of the business of insurance within the meaning of the McCarran-Ferguson Act, and were therefor supplanted by the federal Truth in Lending Act:

In another context, the Supreme Court has recognized a clear distinction between regulation of an established relationship and the regulation of the **formation** of such a relationship. (*See Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) in which a statute granting equal rights to all citizens to make and enforce contracts was held not to supply a cause of action to persons who, **after** making a contract of employment, were allegedly subjected to racial harassment on the job.). Florida's law attempts to regulate the formation of a relationship between a policyholder and an insurance company, arranged by the agent. It does not seek to regulate the relationship between the principals. It is the latter that would be necessary to make the statute one "regulating the business of insurance."

Premium financing has little--if any--effect on an insurance company's ability to pay claims or on the nature of the policies it issues. Further, the activity could effect a policy's enforceability only in terms of whether a policy was in effect at a particular time, a question that might arise in the event of a payment error. Such a dispute, however, does not concern the details of the policy, its terms, or its coverage.

Cochran v. Paco, Inc., 606 F.2d at 466

The Fifth Circuit thus has a far more focused understanding and view of "regulation" of the "business of insurance" than is compatible with the Eleventh Circuit's free-floating and far ranging view of the same subject. As indicated above, the federal law authorizes--and Barnett Bank of Marion County will engage in--only insurance **agency** activities, not insurance underwriting. An insurance **agent** can only sell that which an insurance **company** issues. The insurance **company** is engaged in the business of insurance; an **agent** is not necessarily so engaged. An **agent** lacks the capacity to affect the ability of the **company** to pay claims, affect the policy's enforceability or dictate the details, terms or coverage of the policy to the insurer or insured. Laws that purport to regulate (by prohibiting) the participation of an entity in the insurance **agency** business are not laws that regulate the business of insurance, and the McCarran-Ferguson Act does not apply by its own terms.

○ In *First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990), the plaintiff national bank offered "debt cancellation

contracts" to its borrowers whereby, for a fee paid in advance, the bank agreed to cancel any unpaid balance due on a loan in the event of the borrower's death or disability. Likening the contracts to credit life insurance policies, the Arkansas Insurance Commissioner asserted jurisdiction to regulate the contracts. The court concluded that the bank's activities were authorized by the "incidental powers" clause of the National Bank Act, 12 U.S.C. Section 24(Seventh), which says absolutely nothing about the business of insurance. That being the case, the court went on to hold in favor of the national bank because "under the principle of federal preemption...states may neither prohibit nor unduly restrict their activities." *Id.* at 778. State laws regulating the business of insurance were not saved from preemption in this case because debt cancellation contracts, being within the incidental powers of national banks, "do not constitute 'the business of insurance' under the McCarran-Ferguson Act." *Id.* at 779. The court points out that "the McCarran-Ferguson Act was not directed at the activities of national banks," *id.* and indeed was not directed at any entity that, at the time of passage of the Act, "was not considered to be engaged in the insurance business" and was "not subject to state insurance laws." "Congress certainly did not intend the definition of 'business of insurance' to be broader than its commonly understood meaning." *Id.* (quoting *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 224-227 (1979)). No one would contend that, prior to the enactment of the McCarran-Ferguson Act, the Florida Insurance Commissioner would have had any authority to regulate or prohibit the lawful activities of national banks (such as the power to act as the agent in the sale of insurance granted in 1916 to national banks located and

doing business in small towns); the Eighth Circuit's decision holds that the McCarran-Ferguson Act was not designed to expand an insurance commissioner's powers in this respect. Yet that is precisely the effect the Eleventh Circuit decision will have if it is left unreviewed and unreversed. The views of these two circuits are entirely incompatible.

○ *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co., Inc.*, 50 F.3d 1487 (9th Cir. 1995) reaffirms the continuing validity of the Fifth Circuit's *Cochran* opinion discussed above and of this Court's *Pireno* test for what does or does not constitute the "business of insurance" (even outside the anti-trust context) for McCarran-Ferguson Act purposes. *Merchants* added another element to the discussion, however. The court began by determining that at least some of challenged practices of the defendant involved the "business of insurance" and were therefore governed by state laws regulating the business of insurance within the meaning of the McCarran-Ferguson Act. The court also noted that the allegedly conflicting federal statute, the Racketeer Influenced and Corrupt Organizations Act ("RICO") did not "specifically relate" to insurance. For those practices that were part of the business of insurance, the court determined that there was still an additional hurdle to overcome before the conflicting federal law would be given no force and effect. The McCarran-Ferguson Act does not permit federal law to "invalidate, impair or supersede" contrary state law under certain circumstances, but where giving effect to federal law would not, in fact, invalidate, impair or supersede state law, then federal law will be applied. The court found that RICO was consistent with California insurance laws in substance; the fact that the

available remedies under RICO differed from the remedies available for violation of state law was not sufficient to justify a holding that California law would be invalidated, impaired or superseded if RICO applied. Consequently, the McCarran-Ferguson Act was held not to apply.

In this case, the mere authorization to a national bank located and doing business in a small town to engage in the insurance agency business, without more, does not invalidate, impair or supersede those provisions of Florida law that actually do regulate the "business of insurance" as opposed to "regulating" who may participate in the insurance agency business. Section 92 of the National Bank Act need not be--and has not been--construed to impair or supersede or preempt even-handedly applied licensing and regulatory laws of the states that do not frustrate, burden or impede the federal purpose behind that statute.

II. Conflicts with Governing Precedent of This Court

In addition to the conflicts created by the decision below with the federal circuit cases outlined above, the Eleventh Circuit has acted inconsistently with applicable recent precedent of this Court, and needs to be set straight.

The bulk of the circuit court cases cited above deal with the question whether a particular state law was enacted for the purpose of regulating the business of insurance. But there is a second prong to the McCarran-Ferguson Act as well. Even if a state law is found to regulate the business of insurance, it is still preempted by contrary federal law if the federal law "specifically relates" to the business of

insurance. 15 U.S.C. § 1012(b). The Supreme Court cases discussed below deal with that question and clearly show that Section 92 does "specifically relate" to the business of insurance and therefore preempts contrary state law. The Eleventh Circuit ignored Supreme Court precedent, and its decision is thus flawed and cannot stand.

The court below relied heavily upon a phrase in this Court's decision in *United States Department of the Treasury v. Fabe*, 113 S. Ct. 2202 (1993):

[S]tate laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.

Id. at 2211 (emphasis added).⁶

But *Fabe* does not stand for the proposition for which

⁶ The McCarran-Ferguson Act actually says "specifically relates" rather than "specifically requires." The two words are not synonymous, nor are either of them synonymous with "regulate," though the Eleventh Circuit uses the words interchangeably. This passage in the *Fabe* opinion is dictum in any event because the parties in that case agreed that the federal statute in question did *not* specifically relate to the business of insurance. *Id.* at 2208. A recent unanimous opinion of this Court cautioned that there is a "need to distinguish an opinion's holding from its dicta." *U.S. National Bank of Oregon v. Independent Insurance Agents of America*, 113 S. Ct. 2173, 2186 n. 11 (1993). The Eleventh Circuit failed to heed that caution.

the court below cites it, as shown by a subsequent decision of this Court that found federal preemption in a McCarran-Ferguson context even where the federal statute involved was not an "insurance" law--and even where an internal inconsistency in the federal law arguably lent support to the state law's viability. In *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517 (1993), this Court considered whether provisions in the Employee Retirement Income Security Act ("ERISA") that related to fiduciary standards "governed an insurance company's conduct in relation to certain annuity contracts." *Id.* at 521. In confronting this issue, the Court first considered whether ERISA's fiduciary standards that related to pension fund "plan assets" governed in light of conflicting state law. *Id.* at 525. ERISA provides that a fiduciary acts solely for the benefit of the plan's participants and beneficiaries; state law, however, provides that an insurance company must consider other interests as well. *Id.* John Hancock argued that, because of the McCarran-Ferguson Act, the conflict must be resolved in favor of state law, because "Congress reserved to the States primary responsibility for regulation of the insurance industry." *Id.* This Court, however, found that ERISA should prevail:

ERISA, both in general and in the guaranteed benefit policy provision in particular, obviously and specifically relates to the business of insurance. (citation omitted). Thus, the McCarran-Ferguson Act does not surrender regulation exclusively to the States so as to preclude the application of ERISA to an insurer's actions under a general account contract.

Id. at 525.

But ERISA is clearly a pension, labor and tax law. Its fiduciary standards are applicable generally, not specifically targeted at the "regulation of the business of insurance." In this case, Section 92 is clearly a banking law, as the court below held. As in *Hancock*, however, the characterization of the statute as something other than an "insurance" law should not preclude the court from finding that the law nonetheless "specifically relates" to insurance. A federal statute need not have "insurance" as its main thrust in order that it "specifically relate" to insurance. If that were so, then no federal statute would "specifically relate" to insurance: The McCarran-Ferguson Act decreed, as a matter of federal policy, that "regulation" of insurance would be left to the states; there will be no federal laws that "regulate" the business of insurance. In ERISA, as in Section 92, there are references to insurance and insurance products. That was all this Court needed to find, in *Hancock*, that the statute "obviously and specifically relates to the business of insurance." By way of contrast, in the statute in issue in *Fabe* there were no such references to insurance.

Additionally, relying on the "specifically requires" language that is in the *Fabe* majority opinion (but nowhere in the McCarran-Ferguson Act), the court below held that nothing in Section 92 specifically required the preemption of state laws.

In *Hancock*, this Court itself had a different analysis. It did not seek to determine if there was anything "specific"

in ERISA that "required" preemption of contrary state laws. Indeed, the Court took pains to point out that the statute itself was internally contradictory on that very point: On the one hand, 29 U.S.C. section 1144(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." On the other hand, section 1144(b)(2)(A) provides that ERISA shall not "be construed to exempt or relieve any person from any law of any State which regulates insurance...."

That hardly constitutes the kind of "specific requirement" that the court below would impose upon Section 92 before giving it preemptive effect. And yet this Court, only six months after the *Fabe* decision, concluded that there was

no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis. State law governing insurance generally is not displaced, but "*where [that] law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress, federal preemption occurs.*" (Emphasis added.) ...

[D]ual regulation under ERISA and state law is not an impossibility[;] [m]any requirements are complementary, and in the case of a direct conflict, federal supremacy principles require that state law yield.

Id. at 526 (citations omitted).

It was grievous error for the Eleventh Circuit below

to have equated the words "regulate" and "relate." Doing so allowed the court to conclude that because Congress did not and could not have intended to **regulate** the business of insurance in 1916 when Section 92 was enacted, it must also be true that Section 92 could not **relate** to the business of insurance. Aside from the distinction between those two terms that is implicit in the *Hancock* decision, this Court has likewise made the distinction absolutely explicit in yet another recent decision, *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992):

The ordinary meaning of ["relating to"] is a broad one-- "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with,..."--and the words thus express a broad preemptive purpose....Petitioner contends that § 1305(a)(1) only preempts the States from actually prescribing rates, routes or services. This simply reads the words "relating to" out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to "regulate rates, routes and services."

Id. at 2037-2038 (emphasis in original, citations omitted.) (See also *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 47 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983); *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Neurobehavioral Associates, P.A.*, 53 F.3d 172 (7th Cir. 1995)).

The court below was also wrong in failing to consider the fact that Congress specifically rejected proposed language in an earlier draft of the bill that became the McCarran-Ferguson Act that would, if enacted, have done what the court below says it did anyway. Both the House and Senate

versions of the legislation provided that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance or which imposes a fee or tax upon such business, unless such Act *specifically so provides*." 91 CONG. REC. 488 (1945) (Senate) (emphasis added); *id.* 1085-94 (House). Had Congress enacted that language, a federal act would have to expressly *provide* that it invalidates, impairs, or supersedes state law in order to have preemptive effect. The conference committee, however, changed this language, and instead required that a federal law need only "*specifically relate to the business of insurance*" in order to "invalidate, impair or supersede" a state law. H.R. Rep. No. 213, 79th Cong., 1st Sess. 1 (1945) (conference report). Thus Congress expressly rejected the very formulation the court below imposed.

III. The Importance of the Issue

The Petition for Writ of Certiorari correctly points out that there are a considerable number of states, including some of the larger markets in the country, that have "anti-affiliation" statutes on their books, many or all of which could be asserted to deny to national banks the rights granted them by federal law. In and of itself, that consideration would make this case one of immense practical consequence to banking and commerce in the future. But there is an additional consideration as well. While the decision officially applies only to national banks, the fact of the matter is that approximately thirty-eight states have so-called "wild card" or "parity" statutes on their books, including some of the states that have anti-affiliation statutes as well. With a great many variations, these statutes generally authorize state-chartered banks to exercise the same powers that may be exercised by national banks within the state,

notwithstanding anything else in state banking laws.⁷ In many states, therefore, a federal court decision to the effect that national banks located and doing business in small towns may not sell insurance over the objection of the state insurance commissioner is necessarily also a decision that state-chartered banks in small towns may not sell insurance, thus harming the business opportunities of those banks and their customers as well as the interests of national banks and their customers.

CONCLUSION

For all of the reasons set forth herein and in the Petition for Writ of Certiorari, the American Bankers Association et al., as amici curiae and on behalf of their members, respectfully urge the Court to grant the Petition.

Respectfully submitted,

John J. Gill III
Counsel of Record

Michael F. Crotty
Mathew H. Street

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D. C. 20036
(202) 663-5026

July 7, 1995

⁷ See Appendix to this brief for collection of citations.

APPENDIX

American Bankers Association
Office of the General Counsel
July 5, 1995

STATE ANTI-AFFILIATION AND WILD CARD STATUTES

<u>State</u>	<u>Anti-Affiliation Statute</u>	<u>Wild Card Statute</u>
Alaska		§ 06.01.020
Arizona		§ 6-184(2)
Arkansas	§ 23-64-203(b)	§ 23-32-701(16)
Colorado	§ 10-2-221(2)	§ 11-2-103(5)
Connecticut	§ 38a-775	
Florida	§ 626.988	§ 655.061
Georgia	§ 33-3-23(b)	§ 7-1-61(a)(1)
Hawaii		§ 403-47.1
Idaho		§ 26-1101(3)
Illinois		205 ILCS 5/5(11)
Indiana		§ 28-1-11-2.5 (annuities only)
Kansas		§ 9-1715
Kentucky	§ 287.030(4)	§ 287.020(3)
Louisiana	§§ 6:121B(2), 6:242(A)6	§§ 6:121(B)(1), 6:242(C)

<u>State</u>	<u>Anti-Affiliation Statute</u>	<u>Wild Card Statute</u>
Maine	Tit. 24-A, § 1514-A(2)	Tit. 9B, § 416
Maryland		§ 5-504 Fin Insts
Massachusetts	Ch. 175, § 174E	
Minnesota		§ 48.15 (Subd. 2)
Mississippi	§ 83-17-229	§ 81-5-1(10)
Missouri		§ 362.105(3)
Montana		§ 32-1-362
Nebraska	§ 44-392	
Nevada	§ 683A.110	§ 662.015(1)(f)
New Hampshire	§ 384:16-b(II)	§ 394-A:7
New Jersey	§ 17:3C-1	§§ 17:9A-24a, 17:9A-25(12)
New Mexico	§ 59A-12-10	§ 58-1-54
North Dakota		§ 6-03-38
Ohio	§ 3911.01	§ 1125.23
Oklahoma		Tit. 6 § 203(5)
Oregon		§ 707.340
Pennsylvania	Tit. 40, § 281	
Puerto Rico	Tit. 26, § 304	
Rhode Island	§ 27-3-47	
South Carolina		§ 34-1-110
South Dakota		§ 51A-2-14

<u>State</u>	<u>Anti-Affiliation Statute</u>	<u>Wild Card Statute</u>
Tennessee	§ 56-6-201	§ 45-2-601
Texas	Ins. Code. Art. 21.07-3 § 5(h)	§ 342-113(4) Civ. Stat.
Utah		§ 7-1-301(3)
Vermont	Tit. 8, § 4811	Tit. 8, § 606(a)(1)
Virginia		§ 6.1-5.1
Washington		§ 30.04.215
West Virginia	31A-8C-2(f)	§ 31A-3-2(a)(5)(B)
Wisconsin		§ 220.04(8)
Wyoming		§ 13-3-704

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, *et al.*,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

JOINT APPENDIX

NATHAN LEWIN
(*Counsel of Record*)
SCOTT L. NELSON
J. BRADLEY BENNETT
JAMES R. HEAVNER, JR.
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

RICHARD E. SWARTLEY
General Counsel
BARNETT BANKS, INC.
50 N. Laura Street
Jacksonville, FL 32202
(904) 791-7505

Attorneys for Petitioner

DAVID J. BUSCH
(*Counsel of Record*)
DANIEL Y. SUMNER
General Counsel
FLORIDA STATE DEPARTMENT
OF INSURANCE
200 E. Gaines Street
Tallahassee, FL 32399-0307
(904) 413-4146

*Attorneys for Respondents
Bill Nelson and the Florida
Department of Insurance*

ANN M. KAPPLER
(*Counsel of Record*)
SCOTT A. SINDER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

*Attorneys for Respondents
Insurance Agents*

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dated December 3, 1993 Pet. App. B, 17a

DOCKET ENTRIES

DATE	PROCEEDINGS
10/18/93	Complaint Filed.
10/25/93	Motion by Barnett Bank of Marion County for Temporary Restraining Order or Preliminary Injunction; Memorandum in Support of Motion for Immediate Injunctive Relief.
10/26/93	Order Denying Immediate Injunctive Relief; Order Granting Hearing on Motion for Temporary Restraining Order.
10/27/93	Emergency Motion for Intervention by Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc. And Florida Association of Insurance Agents; Memorandum of Points and Authorities in Support Thereof; Proposed Answer And Affirmative Defenses of Intervenor-Defendants; Order Granting Motion to Intervene.
10/27/93	Memorandum of Defendants The Honorable Tom Gallagher And Florida Department of Insurance in Opposition to Motion for Temporary Restraining Order.
10/27/93	Hearing on Motion for Temporary Restraining Order.

DATE	PROCEEDINGS
10/28/93	Order Denying Motion for Temporary Restraining Order.
11/05/93	Trial Memorandum And Memorandum in Support of Motion for Preliminary Injunction by Barnett Bank of Marion County.
11/08/93	Defendants' Answer to Complaint for Declaratory Relief.
11/10/93	Answer of Barnett Bank of Marion County to Defendants' Counterclaims.
11/10/93	Notice of Amended Answer; Amended Answer, Affirmative Defenses And Counterclaims of Intervenor-Defendants; Memorandum of Points And Authorities in Support Thereof.
11/12/93	Memorandum of The Honorable Tom Gallagher And Florida Department of Insurance in Opposition to Plaintiff's Request for Injunction.
11/12/93	Intervenor-Defendants' Trial Memorandum in Opposition to Trial Memorandum of Barnett Bank of Marion County.

DATE	PROCEEDINGS
11/15/93	Response of Barnett Bank of Marion County to Motion to Amend Answer to Include Omitted Counterclaims.
11/17/93	Reply of Barnett Bank of Marion County to Trial Memoranda of Defendants And Intervenor-Defendants.
11/17/93	Order Granting Intervenor-Defendants' Motion to Amend Answer to Include Omitted Counterclaims.
11/17/93	Answer of Barnett Bank of Marion County to Additional Counterclaims.
11/19/93	Hearing on Motion for Preliminary Injunction And Trial on The Merits.
11/24/93	Intervenor-Defendants' Proposed Findings of Fact And Conclusions of Law.
11/24/93	Proposed Final Order by Barnett Bank of Marion County.
11/24/93	Proposed Final Judgment by The Honorable Tom Gallagher And Florida Department of Insurance.

DATE	PROCEEDINGS
12/03/93	Opinion And Order by The District Court; Judgment Entered for Defendants And Intervenor-Defendants.
12/06/93	Notice of Appeal by Barnett Bank of Marion County.
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01/03/94	Notice of Cross Appeal by Intervenor-Defendants.
02/22/94	Brief for Appellant Barnett Bank of Marion County.
02/22/94	Amicus Brief for The Comptroller of The Currency of The United States.
02/22/94	Amicus Brief for Florida Bankers Association.
02/22/94	Amicus Brief for American Bankers Association, Association of Banks in Insurance, Bankers Roundtable, Consumer Bankers Association, And Louisiana Bankers Association.

DATE	PROCEEDINGS
03/28/94	Brief for Appellees/Cross Appellants The Honorable Tom Gallagher And Florida Department of Insurance.
04/01/94	Brief for Appellees/Cross Appellants Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc. And Florida Association of Insurance Agents.
04/25/94	Reply Brief And Brief for Cross Appellee Barnett Bank of Marion County.
05/06/94	Reply Brief for Cross Appellants The Honorable Tom Gallagher And Florida Department of Insurance.
05/06/94	Reply Brief for Cross Appellants Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc. And Florida Association of Insurance Agents.
01/30/95	Judgment Affirmed by Published Opinion of The Court of Appeals.
02/21/95	Petition for Rehearing by Barnett Bank of Marion County.
03/28/95	Order Denying Rehearing.

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No. 94-1837

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, FLORIDA
DEPARTMENT OF INSURANCE, FLORIDA
ASSOCIATION OF LIFE UNDERWRITERS,
PROFESSIONAL INSURANCE AGENTS OF
FLORIDA, INC., and FLORIDA
ASSOCIATION OF INSURANCE AGENTS,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, 1a-16a) is reported at 43 F.3d 631 (11th Cir. 1995). The opinion of the United States District Court for the Middle

District of Florida (Pet. App. B, 17a-36a) is reported at 839 F. Supp. 835 (M.D. Fla. 1993).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on January 30, 1995. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 28, 1995 (Pet. App. C, 37a-38a). The petition for a writ of certiorari was filed on May 8, 1995. This Court granted certiorari on September 27, 1995. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are the Supremacy Clause of the United States Constitution (art. VI, cl. 2); the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, 59 Stat. 34 (1945); Florida Statutes Annotated § 626.988; and 12 U.S.C. § 92, 39 Stat. 753 (1916). The relevant portions of these provisions are reproduced at Appendix A to this brief, pp. 1a-4a, *infra*.

STATEMENT

1. In 1916, Congress Authorizes Certain National Banks To Sell Insurance.

Congress laid the foundation for the current system of national banks in 1863 by enacting the National Currency Act, 12 Stat. 665 (1863), renamed the National Bank Act, 13 Stat. 99 (1864), the following year. In the National Bank

Act, Congress "set up a system of national banks as federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositaries." *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375 (1954). Because the functions of national banks, "especially as a source for federal credit, depend upon their success in attracting private deposits," the "Federal Government has frequently expanded their functions and authority," so "[t]hat these federal institutions may be at no disadvantage in competition with state-created institutions." *Id.*

The basic powers of the national banks are defined by federal statutes. The most fundamental is 12 U.S.C. § 24, which grants the national banks not only certain specifically enumerated powers, but also, in language dating back to the first national bank legislation in 1863, "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh); *see also NationsBank of North Carolina v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 814 (1995).

In 1916, while legislation expanding the ability of national banks to engage in branch banking was pending before Congress, the Comptroller of the Currency — the federal official "charged with administration of the National Bank Act" (115 S. Ct. at 813) — sent a letter to the Chairman of the Senate Banking and Currency Committee proposing a provision authorizing national banks located in towns with populations not exceeding 3,000 to sell insurance and broker real estate loans. *See* 53 Cong. Rec. 11,001 (1916). The Comptroller stressed that small-town national banks faced competition from state-chartered banks and needed "additional sources of revenue" to "place them in a position where they could better compete with local State banks and trust companies." *Id.*

In response to the Comptroller's letter, an amendment was offered in the Senate to provide express authority for national banks in places with populations not exceeding 5,000 to broker real estate loans and to act as agents in the sale of insurance. The legislation as amended was enacted by both Houses of Congress and signed into law. The provision with respect to insurance agency, subsequently codified as 12 U.S.C. § 92 ("Section 92"), states unequivocally:

In addition to the powers now vested by law in national banking associations . . . , any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State

Section 92's authorization of insurance agency activities by small-town national banks has remained unaltered for nearly 80 years. In *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173 (1993), this Court rejected the argument that Congress had inadvertently repealed it in 1918. The Court noted that both the Comptroller and the courts had long taken the statute's existence as a given. *See id.* at 2176.

The Comptroller, meanwhile, has not, by regulation, limited the power of national banks to sell insurance, and has interpreted the statute expansively to authorize such sales. Since 1963, for example, the Comptroller has taken the position that the statute permits small-town branches of

national banks headquartered in larger communities to sell insurance. This position is embodied in a regulation promulgated by the Comptroller in 1971, which provides that Section 92 "is applicable to any office of a national bank when the office is located in a community having a population of less than 5,000 even though the principal office of such bank is located in a community whose population exceeds 5,000." 12 C.F.R. § 7.7100. The Comptroller has also consistently rejected the argument that Section 92 limits the geographic scope of insurance sales conducted from the offices of small-town national banks. *See* Comptroller Interpretive Letter No. 366 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (August 18, 1986); *NBD Bank, N.A. v. Bennett*, No. 95-1310, 1995 U.S. App. LEXIS 27835 (7th Cir. Oct. 4, 1995); *Independent Ins. Agents of America, Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). The Seventh Circuit summarized the Comptroller's policy position in *NBD, supra*, 1995 U.S. App. LEXIS 27835 at *9:

The Comptroller believes not only that sec. 92 permits small-town branches to sell insurance but also that these sales are desirable: they enhance banks' revenues, diversify their business without creating any threat to their solvency, and increase competition. Banks, buyers of insurance, and the federal deposit insurance fund all gain.

2. In 1945, Congress Passes the McCarran-Ferguson Act To Confirm State Regulatory Authority.

The McCarran-Ferguson Act (59 Stat. 34, codified at 15 U.S.C. §§ 1011-15) was passed nearly 30 years after Section 92. The impetus for the passage of the McCarran-

Ferguson Act was this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), in which the Court, for the first time, held that the business of insurance constituted interstate commerce within the meaning of the Commerce Clause. Cooperative rate-making within the insurance industry was therefore held to be subject to the Sherman Antitrust Act.

The dissents in the *South-Eastern Underwriters* case pointed out that the decision created the very real possibility that state regulatory authority over the insurance industry would be invalidated. See 322 U.S. at 580-82 (Stone, C.J., dissenting); 322 U.S. at 590-93 (Jackson, J., dissenting). The dissenters did not question Congress' power to enact legislation relating to the insurance industry, but in view of longstanding precedent holding that the insurance industry was not a part of interstate commerce, they warned about the potential invalidation of state insurance legislation by implication.

The concerns of the dissenters were echoed by representatives of the insurance industry and by state insurance regulators, who pressed for legislation overturning the result in *South-Eastern Underwriters*. Senators McCarran and Ferguson responded by introducing the legislation subsequently enacted as the McCarran-Ferguson Act. The Act addressed the concerns of the critics of *South-Eastern Underwriters* in two major respects:

First, with respect to *South-Eastern Underwriters*' specific holding applying the federal antitrust laws to the insurance industry, the Act prescribed a moratorium until June 30, 1948, on the application of the Sherman, Clayton, Federal Trade Commission and Robinson-Patman Acts to the "business of insurance" (except with respect to acts of boycott, coercion, or intimidation). 15 U.S.C. § 1013. The

Act provided that the antitrust laws would thereafter be applicable to "the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b).

Second, with respect to the concerns voiced by the *South-Eastern Underwriters* dissenters and by state regulators that the decision might deprive States of the power to regulate insurance altogether, the Act recognized congressional authority to legislate regarding the business of insurance, but it rejected displacement of state law regulating the business of insurance where there was no federal legislation. The Act declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that *silence* on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011 (emphasis added). The Act further provided that "[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). And in the provision most pertinent here, the Act prescribed that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

As a result, the McCarran-Ferguson Act shields a state law against federal pre-emption if two statutory conditions are satisfied. *First*, the state law in question must be a "law enacted . . . for the purpose of regulating the business of insurance." *Second*, the state law may not conflict with any act of Congress that "specifically relates to the business of insurance."

3. In 1974, Florida Prohibits Certain National Banks from Selling Insurance.

The state law with which this case is concerned is Fla. Stat. Ann. § 626.988. It was enacted in 1974, in response to requests by several Florida bank holding companies for approval by the Federal Reserve Board of applications to operate insurance agencies. The legislation originally introduced in the Florida legislature contained a preamble setting forth its rationale in a series of "whereas" clauses. See Committee Substitute for H.B. 3152, 3rd Fla. Leg., 2d Reg. Sess. (1974), reproduced as Appendix B to this brief, pp. 5a-10a, *infra* ("H.B. 3152"). The reasons stated in the preamble were that competition from banks might be disadvantageous to small insurance agencies; that banks might attempt to "tie" sales of insurance to other services sought by their customers (particularly the extension of credit); that banks, as depositories of the funds of others, should not be in competition with their depositors; and that permitting banks to engage in insurance sales activities could lead to "undue concentration of economic resources." The preamble did not mention the McCarran-Ferguson Act. It stated that the legislation was an exercise of legislative authority reserved to the states in the Bank Holding Company Act of 1956, 12 U.S.C. § 1846.

The preamble was deleted in an amendment offered just before final passage of the legislation. See *Journal of the Florida House of Representatives*, 3rd Fla. Leg., 2d Reg. Sess. 551 (May 2, 1974). There is no indication in the legislative history that the amendment reflected a disavowal of the reasons stated in the preamble. Nor is there in the legislative history any statement of purpose of the legislation other than the preamble.

Section 626.988 provides generally that insurance agents may not engage in "insurance agency activities" (*i.e.*, the "solicitation, negotiation, selling, effectuating, or servicing of any policy or contract of insurance other than credit life insurance and credit disability insurance") if they are associated with, under contract with, retained by, owned or controlled by, or employed by any "financial institution." The term "financial institution" is defined to include banks, bank holding companies, savings and loans, and savings and loan holding companies. Excepted from the statute's definition of "financial institutions" are banks located in cities with populations of less than 5,000 that are not owned by or affiliated with a bank holding company. The statute thus permits *some* national banks (those not owned by a holding company) to engage in the insurance sales activities authorized by 12 U.S.C. § 92. But the statute forbids any national bank affiliated with a bank holding company from exercising the authority granted by Section 92 to sell insurance from a small-town branch.

Before this case arose, Section 626.988 was challenged in the Florida state courts on substantive due process and equal protection grounds in *Glendale Fed. Sav. & Loan Ass'n v. Florida Dep't of Ins.*, 587 So. 2d 534 (Fla. App. 1991), *review denied*, 599 So. 2d 656 (Fla. 1992). In that case, the Florida District Court of Appeal upheld the statute as rationally based, on the ground that a rational legislature "could" have decided that permitting banks to sell insurance would help prevent "coercion, unfair trade practices, and undue concentration of resources." *Id.* at 541.

4. In 1993, Barnett Bank Buys an Insurance Agency.

Petitioner Barnett Bank of Marion County ("Barnett Bank" or "the Bank") is a national bank doing business in

the State of Florida. Barnett Bank is a subsidiary of a bank holding company, Barnett Banks, Inc. The Bank has a branch in Belleview, Florida, a town with a population of 2,666.

In 1993, Barnett Bank purchased an insurance agency that had been owned by Ms. Linda Clifford, a licensed Florida insurance agent. Ms. Clifford became an employee of Barnett Bank, with an office located in Belleview. Four days later, the Florida Department of Insurance issued an order pursuant to Section 626.988 directing Ms. Clifford and her associates to cease all their insurance agency activities other than the sale of credit life and disability insurance (which the Florida statute permits).

5. Barnett Bank Litigates and Loses.

Simultaneously with its acquisition of Ms. Clifford's agency, Barnett Bank filed this action against the Insurance Commissioner of the State of Florida and the Florida Department of Insurance in the United States District Court for the Middle District of Florida, seeking a declaratory judgment that 12 U.S.C. § 92 pre-empted Section 626.988, which otherwise would prohibit the Bank or any of its employees from acting as an insurance agent. When the Florida Department of Insurance issued its order requiring the Bank's insurance agency to cease operations, the Bank moved for a temporary restraining order and preliminary injunction. The District Court denied the TRO. It consolidated the motion for preliminary injunction with a trial on the merits of the Bank's claims for permanent declaratory and injunctive relief, as well as with the defendants' counterclaims for a declaratory judgment that the Florida statute was not pre-empted. Associations of Florida insurance agents intervened before trial as defendants and counter-claimants.

After trial, the district court denied the motion for a preliminary injunction and issued a final judgment denying Barnett Bank's requests for permanent injunctive and declaratory relief. The court acknowledged that the Florida statute prohibiting the Bank from operating an insurance agency directly conflicted with 12 U.S.C. § 92. Nonetheless, the court held that the Florida law was saved from pre-emption by the McCarran-Ferguson Act. According to the court, the Florida statute prohibiting banks from acting as insurance agents was a law regulating the "business of insurance," while the federal statute permitting banks to act as insurance agents was not a law "specifically relat[ing] to the business of insurance." 839 F. Supp. at 842-43, Pet. App. 32a-35a.

The Court of Appeals for the Eleventh Circuit affirmed. Ignoring the contrary decision of the Sixth Circuit in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), Pet. App. D, 39a-64a, the Eleventh Circuit accepted both parts of the district court's analysis of the McCarran-Ferguson Act. Purporting to apply a test derived from this Court's decision in *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), the court of appeals concluded that the Florida statute "regulat[es] the business of insurance" within the meaning of the McCarran-Ferguson Act because the Florida law "was enacted to regulate the relationship between insurers and *potential* policyholders or, more broadly, 'the insurance-purchasing public at large.'" 43 F.3d at 635, Pet. App. 11a. The Eleventh Circuit also held that 12 U.S.C. § 92, the federal statute permitting small-town national bank branches to operate insurance agencies, does not "specifically relat[e] to the business of insurance." The court reasoned that in permitting such banks to sell insurance, "Congress was concerned with banking, not insurance." 43 F.3d at 637, Pet. App. 15a.

SUMMARY OF ARGUMENT

This case will decide whether the power to sell insurance explicitly and deliberately granted to certain national banks by Congress in 1916 is overridden by a state law enacted more than half a century after the empowering federal statute. The federal policy favoring the exercise of this power by the specified national banks has been consistently endorsed since the initial enactment by Comptrollers of the Currency, who are entrusted to implement national policy on this subject.

The claimed justification for overriding the 1916 federal law is language in the McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011-1015, that shields state laws regulating the business of insurance from federal preemption, except where such laws conflict with a federal statute that "specifically relates to the business of insurance." The state law at issue in this case is Fla. Stat. Ann. § 626.988, which Florida enacted in 1974 to prohibit banks from selling insurance in Florida. The McCarran-Ferguson Act does not, however, validate the Florida law.

1. The Florida law is in direct conflict with 12 U.S.C. § 92, which authorizes the sale of insurance by national banks in towns whose population does not exceed 5,000. Decisions of this Court have firmly established that the Supremacy Clause of the United States Constitution invalidates any state law that prohibits conduct explicitly authorized by a federal statute.

2. The Florida law is not rescued by Section 2(b) of the McCarran-Ferguson Act because its stated purpose — expressed in a preamble to the bill when it was introduced — was to prevent banks from competing with insurance agencies because banks were thought to have excessive

economic power. The Florida law was enacted in the exercise of the state legislature's perceived power to regulate banks, not to regulate "the business of insurance."

In addition, the Florida law is a bare pin-pointed prohibition, not part of a scheme of regulation. And the language of the McCarran-Ferguson Act, as well as its legislative history, establishes that the federal law contemplated state regulation of insurance, not a prohibition against sale of insurance by otherwise qualified agents.

Finally, the Florida law does not regulate the aspects of insurance that deal with policyholders and with the enforcement of insurance contracts. This Court's decisions have articulated the guiding principle that a law "regulating the business of insurance" must be one that concerns the relationship between the insurer and the insured, and the details and enforcement of an insurance contract. The Florida law does not deal with, or directly affect, those subjects.

3. Alternatively, the Florida law cannot be applied because it conflicts with Section 92, which is a law that "relates to the business of insurance." The word "relates" — which is the critical term in the second prong of the test prescribed by Section 2(b) of the McCarran-Ferguson Act — is obviously broader than the term "regulating," which controls the first prong of the test. If the Florida law can be deemed to "regulate" the business of insurance, it is inconceivable that Section 92 would not be deemed to "relate" to insurance.

The court of appeals rejected this position on wholly untenable grounds. It read into Section 2(b) of the McCarran-Ferguson Act a requirement that the federal law *specifically* repudiate the state law. This was proposed in an

earlier draft of the McCarran-Ferguson Act that was rejected by Congress. The court of appeals' other reason — *i.e.*, that Congress could not have intended in 1916 to "regulate" insurance — is wholly beside the point. Congress' 1916 enactment "related" to insurance even though its legislative power was exercised as a necessary and proper outgrowth of its power to create national banks.

ARGUMENT

I.

SECTION 626.988 CONFLICTS WITH SECTION 92

Section 92 expressly and specifically authorizes national banks located in towns with populations not exceeding 5,000 to sell insurance. The terms of the federal statute are unambiguous. Its purpose was set forth in the letter written in 1916 to Congress from the Comptroller of the Currency. It was designed to provide additional sources of revenue for national banks located in small towns.

If the terms of the statute and its legislative history left any room for doubt, the Comptroller of the Currency, to whose interpretation of the National Bank Act this Court has consistently deferred (*see NationsBank of North Carolina v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995)), has consistently taken the position that Section 92 permits small-town national banks (and small-town national bank branches) to sell insurance. Today's Comptroller has reiterated the purpose of this authority — to enhance the revenues and financial stability of small-town national banks. The statute, its history, and its construction by Comptrollers since 1916 thus leave no doubt that the purpose and effect of the statute are, as the Seventh Circuit recently put it, to

"identif[y] a line of business in which national banks may engage." *NBD Bank, N.A. v. Bennett*, No. 95-1310, 1995 U.S. App. LEXIS 27835 (7th Cir. Oct. 4, 1995).

Section 626.988, by contrast, denies national banks — at least those affiliated with bank holding companies — the authority to do what Section 92 empowers them to do. Under the Supremacy Clause, such a direct clash between federal and state legislation can have but one result: the state statute is pre-empted. As this Court has repeatedly held, state laws are pre-empted when they conflict with federal law by "'stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (opinion of O'Connor, J.) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Felder v. Casey*, 487 U.S. 131, 138 (1988); *Perez v. Campbell*, 402 U.S. 637, 649 (1971)).

It is clear that a state law that directly forbids a national bank to exercise a power expressly conferred by Congress conflicts with the federal statute. In *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954), this Court held that a federal law expressly granting national banks authority to receive savings deposits pre-empted a state statute denying national banks the right to use the word "savings" in advertisements. The Court concluded that "the federal and state statutes are incompatible, and in such circumstances the policy of the State must yield." 347 U.S. at 374. The Court emphasized that the federal legislation was "declaratory of the right of a national bank to enter into or remain in that type of business." Because the Court found "no indication that Congress intended to make this phase of national banking subject to local restrictions," it concluded that there was "a clear conflict" between the state and federal

statutes and the state-law restrictions "must give way to the contrary federal policy." *Id.* at 377-79.

In *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982), the Court addressed a similar issue: whether a federal regulation permitting a federally chartered savings and loan to enforce a "due on sale" clause in a mortgage pre-empted state law prohibiting such clauses. Although the federal regulation simply *permitted* the use of such clauses and did not *require* it, the Court had no difficulty concluding that the state prohibition was in conflict with the federal regulation (458 U.S. at 155 (citations omitted)):

The conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the security property is transferred. . . . Although compliance with both [the federal and state law] may not be "a physical impossibility," the California courts have forbidden a federal savings and loan to enforce a due-on-sale clause solely "at its option" and have deprived the lender of the "flexibility" given it by [federal law].

The Court stressed that the state law forbade a "practice the [Federal Home Loan Bank] Board has approved and views as critical to 'the financial stability of the association.'" *Id.* at 156. The Court concluded, "By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created 'an obstacle to the accomplishment and execution of the full purposes and objectives' of [federal

law]." *Id.* at 156 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

By the same token, Section 626.988 limits the "availability of an option" — the power of a small-town national bank to sell insurance — that both Congress and Comptrollers of the Currency have long considered important to the well-being of small-town national banks. Under conventional pre-emption principles applied in *Franklin Nat'l Bank* and *De La Cuesta*, Section 626.988 should be pre-empted by the federal law.

The question posed by this case is whether these "ordinary pre-emption principles" must give way in this instance to a "special federal statute" — the McCarran-Ferguson Act. See *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57, 58 (1st Cir. 1993) (Breyer, J.). That question depends, in turn, upon whether the Florida statute, Section 626.988, is a "law enacted . . . for the purpose of regulating the business of insurance" within the meaning of McCarran-Ferguson, and, if so, whether Section 92 nonetheless prevails over Section 626.988 because Section 92 "relates specifically to the business of insurance."

II.

SECTION 626.988 AFFECTS BANKS AND INSURANCE AGENTS BUT IT DOES NOT "REGULATE THE BUSINESS OF INSURANCE"

The Florida law we are challenging in this case can pass its first hurdle under the McCarran-Ferguson Act only if it is a "law enacted by [Florida] for the purpose of regulating the business of insurance." 12 U.S.C. § 1012(b).

We demonstrate below that Section 626.988 does not satisfy this language of the McCarran-Ferguson Act, particularly not in light of the Act's legislative history. We also demonstrate that Section 626.988 does not pass muster under the principles articulated in this Court's decisions construing Section 2(b) of the McCarran-Ferguson Act. Rather than affecting performance of an insurance contract or otherwise protecting or regulating the relationship between the insured and the insurer, the Florida law affects competition between banks and insurance agents and protects the interests of the agents.

A. Section 626.988 Does Not Satisfy Any of the Three Statutory Tests.

Section 2(b) shields against pre-emption only a state law that has been enacted

- (1) "for the purpose"
- (2) "of regulating"
- (3) "the business of insurance."

Three questions must, therefore, be satisfactorily answered before the state law qualifies:

- (1) *Why* was the law enacted? Was its purpose to regulate the business of insurance?
- (2) *How* does the law operate? Is it a form of regulation?
- (3) *What* is its subject? Does it deal with the business of insurance?

Section 626.988 fails all three tests. Its purpose is not the statutorily defined purpose. Its form is not the form of regulation. And its target is not the business of insurance.

(1) Why was the Florida law enacted?

Section 626.988 was enacted in 1974 to avoid the Federal Reserve Board's anticipated approval of applications submitted by several bank holding companies, including Barnett Banks of Florida, Inc., for permission to offer insurance to their Florida customers. *See Florida Ass'n of Ins. Agents, Inc. v. Board of Governors*, 591 F.2d 334, 336 (5th Cir. 1979). While the Federal Reserve Board was considering an administrative law judge's recommendation to approve the applications, identical bills were introduced in both chambers of the Florida legislature to preclude the banks from employing agents to sell most forms of insurance. *See* H.B. 3152, App. B, *infra*, 5a-7a; S.B. 0525.

The preamble to the bills that became Section 626.988 set forth the legislature's objectives: (1) to prevent the "demise of small insurance agencies" due to competition with banks; (2) to diminish the possibility that prospective borrowers would feel pressure to utilize other banking services, including insurance agency sales, in order to better their chances of obtaining funds; (3) to keep banks from "competing" with their depositors; and (4) to prevent "the undue concentration of economic resources," presumably by large bank holding companies. The first of these goals reflects simple economic protectionism, and a preference for the interests of independent insurance agents over those of banks — objectives that have nothing to do with the regulation of the business of insurance. The second and third are purely bank-oriented, pertaining to the relationship between borrowers, depositors, or the public at large and banks acting in their capacity as savings or lending

institutions. The fourth reflects a social policy having nothing at all to do with insurance, and everything to do with hostility toward large banking enterprises. *None* of the Florida legislature's objectives aims to protect insurance policyholders vis-a-vis insurers with respect to the underwriting, interpretation, reliability, enforcement, or performance of insurance contracts.

Indeed, the concerns of the Florida legislature as set out in the preamble to Section 626.988 almost precisely parallel the considerations that the Federal Reserve Board is required by statute and regulation to consider in ruling on a request by a bank holding company for approval to engage in insurance agency activities under 12 U.S.C. § 1843(j)(2)(A) and 12 C.F.R. § 225.24(a). Specifically, those provisions require the Board to consider whether bank holding company activities "can reasonably be expected to produce benefits to the public (such as greater convenience, increased competition, and gains in efficiency) that outweigh possible adverse effects (such as undue concentration of resources, decreased or unfair competition, conflicts of interest, and unsound banking practices)." *Id.* The striking convergence between these concerns of federal bank regulation and the ostensible interests served by Section 626.988 (as reflected in its preamble) makes clear that the essential aim of the statute was regulation of bank holding companies and other financial institutions, and not "regulating the business of insurance."

That the Florida legislation was enacted for the purpose of regulating banks, and not the insurance business, is confirmed by the statutory authority that Florida invoked. When enacting Section 626.988, the Florida legislature did not rely on the McCarran-Ferguson Act, as it had in 1947, when it passed legislation to control "unfair trade practices" in the insurance industry. *See Fla. Stat. Ann. § 626.951.*

Instead, the preamble to Section 626.988 invoked Section 7 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1846, as authority to enact legislation "with respect to bank holding companies." H.B. 3152, App. B, *infra*, 7a. If Florida intended in 1974 to regulate the business of insurance, rather than the conduct of banks, that purpose was exceptionally well concealed.

The court of appeals mistakenly looked to the purpose behind Florida's enactment in 1947 of the law regulating "Unfair Insurance Trade Practices" rather than to the purpose of the 1974 law — which was inserted, in the codification of Florida's law, in the part dealing with insurance trade practices. The court of appeals cited a "reference in the Florida statute to McCarran-Ferguson" (43 F.3d at 636, Pet. App. 12a), but that is not a reference made in 1974. It is a reference made more than 25 years earlier in the enactment of a different Florida law.

The essential function of the 1974 enactment of Section 626.988 was to limit longstanding bank powers and otherwise to control the relationship between banks and their Florida customers. Laws enacted for this purpose do not escape pre-emption under the McCarran-Ferguson Act, because "[t]he McCarran-Ferguson Act was not directed at the activities of national banks." *First Nat'l Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 779 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990). As the Court of Appeals for the Sixth Circuit concluded in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3145 (U.S. July 13, 1995) (No. 95-74), with respect to a Kentucky law that regulates banks in much the same manner as does Section 626.988 (44 F.3d at 392, Pet. App. 48a):

[The law] helps to define the powers of Kentucky bank holding companies by excluding such companies from participation in the activities that constitute the "business of insurance." Excluding a person from participation in an activity, however, is different from regulating the manner in which the activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity.

See also, *United Services Auto. Ass'n v. Muir*, 792 F.2d 356 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). Because the purpose of the Kentucky statute was to restrain banks, and not to regulate the manner in which the "business of insurance" is conducted, the Sixth Circuit correctly held that the McCarran-Ferguson Act did not immunize the Kentucky law from pre-emption by Section 92. The same principle applies to Florida's law.

(2) How does the Florida law operate?

Section 626.988 has one intended effect — it excludes certain banks from the business of selling insurance in Florida. It does not, in any manner, regulate the integrity or efficiency of the insurance business within the State. It is not, therefore, an act *regulating* the business of insurance.

The McCarran-Ferguson Act was adopted to preserve the regulatory systems that various States had enacted and adopted with respect to the "business of insurance." This Court recently reaffirmed in *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2207 (1993), an observation first made in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946), with regard to the reason why the McCarran-Ferguson Act was adopted: "Obviously Congress' purpose

was broadly to give support to the *existing and future state systems* for regulating and taxing the business of insurance" (emphasis added).

The legislative history of the Act — which we describe more fully at pp. 30-34, *infra* — clearly demonstrates that Section 2(b) was not designed to authorize isolated, sporadic and pin-pointed forays by state legislatures into areas that could affect the insurance business. Congress was seeking to shield legitimate state regulatory systems, not random prohibitory legislation.

That is why Section 2(a) of the McCarran-Ferguson Act speaks of subjecting the "business of insurance" to "the laws of the several States which relate to *the regulation or taxation of* such business" (emphasis added). The words "regulation or taxation" are otherwise entirely superfluous. If Congress had intended to protect *every* state law affecting insurance from pre-emption regardless of whether it was truly a form of "regulation," Section 2(a) could simply have read: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to such business." And Section 2(b) could also, for the same reason, have been streamlined to omit the term "regulating" and the statutory reference to "a fee or tax." It could simply have preserved from pre-emption "any state law affecting the business of insurance."

To read Section 2(b) as applying to any state law regardless of whether it is truly regulatory "would be to read words out of the statute" — a form of statutory interpretation that this Court "refuse[d] to do" in *Fabe*, *supra*, 113 S. Ct. at 2209-10, and that it should similarly refuse to do in this case.

Another indication that a state law must be scrutinized under the McCarran-Ferguson Act to determine whether it is a *bona fide* form of "regulation" is the Act's repeated dual reference to both regulation and taxation. These appear as twin components of Sections 1 and 2. Section 1 declares that "regulation and taxation by the several States" is in the public interest, and that Congress' silence is not to be read as a barrier "to the regulation or taxation" of the insurance business. Section 2(a) also subjects the insurance business to state laws "which relate to the regulation or taxation of such business." And Section 2(b) provides, in the disjunctive, that a state law is valid if its purpose is "regulating" or if it "imposes a fee or tax" upon the insurance business.

Not every monetary exaction can qualify, however, as "taxation." A confiscatory levy — such as, for example, a hypothetical ten-thousand-dollar fee for every insurance contract written by any insurance agent employed by or associated with a bank — would obviously not qualify as "taxation" or as "a fee or tax." Cf. *Child Labor Tax Case*, 259 U.S. 20, 38 (1922); *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1946 (1994). Such a state law imposing an exaction masquerading as a tax would plainly be distinguishable from the type of conventional state taxation of the business of insurance upheld in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946), which held that a South Carolina statute imposing a three percent gross receipts tax on premiums received by foreign insurers in the state constituted a legitimate tax on the business of insurance.

By the same token, not every state law that restricts or prohibits conduct by insurance agents is a law "regulating" the insurance business within the meaning of Section 2(b). The Florida law on which this case focuses

fails in this respect because, rather than "regulating" insurance, it simply excludes certain individuals — for reasons that have nothing to do with their competence, integrity, or ability to write insurance contracts — from the business of selling insurance. Ms. Linda Clifford, who had owned her insurance agency in Belleview, Florida, before she sold it to Barnett Bank, was as personally qualified to sell insurance after she became a Barnett Bank employee as she had been previously. Yet, under the guise of "regulating the business of insurance," the state authorities directed her to cease her sales because of her association with the bank. This, we submit, is not part of a system of "regulation" contemplated by Section 2(b) or by the draftsmen of the McCarran-Ferguson Act.

(3) What is the subject of the Florida Law?

Section 626.988 does not operate to adjust, manage or control the business of insurance in any manner whatsoever. It does not manage the spreading or underwriting of risks or govern the interpretation, reliability or enforcement of any contract of insurance. The Florida law imposes no standards of performance pertaining to insurance companies or their brokers, solicitors and agents, and it provides no tangible benefits to policyholders with respect to the performance or enforcement of the insurance contract.

Nor was the statute intended to affect the performance or enforcement of any insurance contract. In enacting Section 626.988, the Florida legislature expressed no concern about the quality or reliability of any insurance policy that banks might broker, and it made no mention of any potential impact on the stability or solvency of insurance companies. Instead, the primary justification identified in support of the law was the desire to prevent "the demise of

small insurance agencies" that might result from competition with banks. H.B. 3152, App. B, *infra*, 6a. This concern may implicate the business of insurance agents, but it does not reflect any intent to protect policyholders, or otherwise to regulate the "business of insurance."

Notwithstanding the actual and intended effects of the Florida statute, the district court construed Section 626.988 to regulate the business of insurance because the statute "appear[ed] to define or regulate a relationship between insurer and *potential* policyholder, that is, 'the insurance-purchasing public at large.'" 839 F. Supp. at 840, Pet. App. 28a. The court of appeals affirmed that conclusion, holding that Section 626.988 "was enacted to regulate the relationship between insurers and *potential* policyholders." 43 F.3d at 635, Pet. App. 11a. In addition, relying on trial testimony by an official of the Florida Department of Insurance, the court held that the Florida statute "protect[ed] policyholders by regulating the financial stability of insurance companies." 43 F.3d at 636, Pet. App. 12a. These asserted bases provide no support for the legal conclusion that Section 626.988 regulates the business of insurance.

A regulation aimed at protecting "potential policyholders" from "overreaching by banks," even if the concern about overreaching is grounded in reality, is not one that regulates the "business of insurance." The "overreaching" that Florida claims to be concerned about is the possibility of "tying" insurance sales to other bank services (in particular, extension of credit), such that bank customers will feel pressured to purchase insurance in order to avail themselves of the other benefits of their relationship

with the bank.¹ It is evident, however, that this supposed concern is not about the relationship of policyholder and insurer pursuant to a contract of insurance. Nor does it relate to the underwriting, performance or enforcement of the contract of insurance. Rather, it centers directly upon the relationship of banks, acting as savings or lending institutions, with their customers. See H.B. 3152, App. B, *infra*, 5a-7a; see also *Glendale Fed. Sav. & Loan Ass'n v. Florida Dep't. of Ins.*, 587 So.2d 534 (Fla. App. 1991).

In other words, the conduct being regulated by Florida does not relate to banks as "insurers" or "agents for insurers," but as financial institutions whose methods of attracting depositors, offering credit, and competing with other providers of financial services are an integral part of the business of banking, and not the "business of insurance." Cf. *FTC v. Dixie Fin. Co., Inc.*, 695 F.2d 926, 931 (5th Cir.) (holding that regulations aimed at preventing tying of insurance sales to extensions of credit do not regulate the business of insurance), *cert. denied*, 461 U.S. 928 (1983). That this relationship is fundamentally a concern of *banking* regulation, and is not an integral part of the "business of insurance," is confirmed by the fact that comprehensive federal banking regulations are already in place to prevent such tying practices. See 12 U.S.C. §§ 1971-78; see also Fla. Stat. Ann. § 626.9551.

As for the supposed relationship between the prevention of bank sales of insurance and the solvency of insurers, it rests on the exceedingly dubious proposition that

¹ There is no empirical evidence in the record to indicate that such practices, which are illegal under federal banking regulations, would occur to any significant degree if national banks affiliated with bank holding companies were permitted to sell insurance in small towns in Florida.

banks are more likely than other insurance agents to induce insurers to use unsound underwriting practices in issuing policies. There is no reason to believe this is true.² More importantly, however, there is no reason to believe that protection of insurance companies from this supposed danger is one of the "purposes" of Section 626.988. The preamble to the Florida legislation contains no mention of this concern, nor is it addressed in *Glendale*, 587 So. 2d 534, in which a Florida appellate court considered the purposes of the statute in upholding it against equal protection and due process challenges.

The *only* support for the notion that concerns for insurer solvency underlie Section 626.988 is the trial testimony of the Florida Insurance Department's Director of

² The testimony offered by respondents below about how Florida law presently operates to protect "the solvency of the insurance industry" (43 F.3d at 636, Pet. App. 12a) did not explain how Section 626.988 addressed this concern, but simply described *other* Florida statutes that address it. In 1983, Florida enacted a law that limits the control wielded by "third party administrators." See Fla. Stat. Ann. §§ 626.888-.894. In 1984, a similar law was passed with respect to "managing general agents." See Fla. Stat. Ann. §§ 626.7451-.7454. In 1992, Florida passed another law to control producers of insurance premiums in an amount greater than 5% of the admitted assets of an insurer. See Fla. Stat. Ann. § 626.7491. There is no dispute that these laws of general application were intended to protect the solvency of insurance companies by limiting the opportunity for powerful third parties to influence underwriting decisions. The testimony about the effect of Section 626.988, however, was wholly based on the erroneous assumption that Section 626.988 "addresses the same dangers that the legislature has addressed" in these statutes. See Tr. at 69. The testimony offered no support for that contention. Indeed, it is difficult to imagine how Section 626.988 could protect the solvency of insurance companies in ways that other applicable laws fail to do.

Legal Services. Such *post hoc* opinion testimony, however, has no place in the determination of the statute's "purpose" in addressing the pre-emption issue under the McCarran-Ferguson Act. See *Pacific Gas & Elec. Co. v. Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 216 (1983) (holding that courts should not look behind avowed purpose of legislature in addressing a pre-emption question turning on statutory purpose). Even if the Director had been personally involved in the passage of Section 626.988, his opinion about the purpose of the statute would be just that — an irrelevant opinion. See *Russello v. United States*, 464 U.S. 16, 26 (1983); *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

Nor can Section 626.988 be deemed a law regulating the "business of insurance" on the ground that insurance sales by agents affiliated with banks could result in poor underwriting decisions which, in turn, could lead to the insolvency of insurance companies. Regulation of the relationship between an insurance company and persons other than policyholders (in this case, banks) does not constitute regulation of "the business of insurance" simply because such regulation may indirectly enhance the solvency or reliability of the insurance company. Precisely the same argument was rejected by this Court in *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), and in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). The Court explained in *Fabe* that the argument went "too far" because any regulation of the relationship of an insurance company with some other entity "ultimately may redound to the benefit of policyholders by enhancing the reliability of the insurance company." 113 S.Ct. at 2212. And in *Royal Drug* the Court held that improving the "reliability" of an insurer was not regulation of the "business of insurance" but of the "business of insurance companies." 440 U.S. at 217.

B. The Legislative History of the McCarran-Ferguson Act Supports the Conclusion that Section 626.988 Is Not the Kind of Law Contemplated by Section 2(b).

It is wholly undisputed that the McCarran-Ferguson Act was Congress' response to this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). See *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538 (1978). On June 5, 1944, in the *South-Eastern Underwriters* decision, this Court held by a 4-to-3 vote (Justices Roberts and Reed not participating), that the "modern insurance business" (322 U.S. at 539) is "Commerce among the several States" within the reach of Congress' power under the Interstate Commerce Clause of the United States Constitution, so as to be subject to the federal antitrust laws. In so doing, the Court majority repudiated its oft-quoted pronouncement that "[t]he business of insurance is not commerce." *Hooper v. California*, 155 U.S. 648, 654-55 (1895). See also *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869) ("issuing a policy of insurance is not a transaction of commerce").

Three respected Justices of this Court dissented in the *South-Eastern Underwriters* case — Chief Justice Stone and Justices Frankfurter and Jackson. In addition to arguing that Congress did not intend, when it enacted the Sherman Act in 1890, to have it reach the "business of insurance," Chief Justice Stone contended that "the business of writing insurance" — *i.e.*, the issuance of *contracts* of insurance — was not interstate commerce in the constitutional sense. 322 U.S. at 571. He concluded his dissent with dire predictions of the consequences of the majority's decision on existing state regulation of the insurance business. He said that the "immediate and only practical effect of the decision now

rendered is to withdraw from the states, in large measure, the regulation of insurance and to confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance." 322 U.S. at 580-581.

Justice Frankfurter's brief dissent echoed the then-Chief Justice's view that the Court's ruling would result in "far-reaching dislocations" between federal and state power. 322 U.S. at 584. And Justice Jackson's dissent rested on the premise that the Court's early decisions concerning the regulation of insurance required it to determine "either that insurance was subject to state regulation or that it was subject to no existing regulation at all." 322 U.S. at 585. Justice Jackson said that "[t]he orderly way to nationalize insurance supervision, if it be desirable, is not by court decision but through legislation." *Id.* at 593. He noted, however, that "we have not a hint from Congress that it concurs in the plan to federalize responsibility for insurance supervision." *Id.* at 591.

Confronted with these prophecies that the robust *corpus* of state regulation and taxation of the insurance business would be supplanted by a skeleton of federal statutes, Congress sought to undo the damage. Senators McCarran and Ferguson co-sponsored legislation designed "to express the intent of the Congress with reference to the regulation of the business of insurance." 91 Cong. Rec. 478 (1945). The first section of the McCarran-Ferguson bill was, like the current 15 U.S.C. § 1011, a declaration of purpose:

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that the Congress hereby declares that the continued

regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Prior to the introduction of the McCarran-Ferguson bill there had been substantial discussion in both the House and Senate as to what power remained with the States to regulate insurance after the *South-Eastern Underwriters* decision. Proponents of legislation expressed the fear that "every state statute, court decision, and departmental ruling relating to the taxation of insurance became immediately questionable." Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 Duke L.J. 587, 590 (1978) (quoting from Sawyer, *Insurance as Interstate Commerce* 50-51 (1945)). Illustrative of the kind of concern that led to the enactment of Section 2(b) was the statement by Senator Radcliffe of Maryland, who conveyed President Roosevelt's approval of the bill (91 Cong. Rec. 481 (1945)), and went on to say (*id.* at 482):

The insurance commissioners and many of the insurance companies have been in great doubt as to how they could operate at this time with respect to matters of collection of premiums, general regulations, the issuing of licenses, and many other aspects of the business. Therefore it seems very desirable that somewhere in this measure there should be a statement that the rights of the States to regulate and to collect taxes should not be repealed by implication.

It is plain from all the debate prior to the passage of the initial versions of the McCarran-Ferguson Act by the Senate in January 1945 and by the House in February 1945 that Congress was concerned about entire regulatory schemes that were in place in most States. This same concern emerges from the debate that followed issuance of the Conference Report in late February 1945. Senators wished to be sure that the new law would maintain in place the *existing systems of insurance regulation by the States*. Senator McCarran read the following statement from the House Judiciary Committee report (91 Cong. Rec. 1442 (1945), quoting from H.R. Rep. No. 213, 79th Cong., 1st Sess. (1945) (emphasis added)):

It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we should provide for *the continued regulation and taxation of insurance by the States*, subject, always, however, to the limitations set out in the controlling decisions of the United States Supreme Court

The uncertain validity of state regulation of insurance was again emphasized by Senator Radcliffe's statement on the day the Senate finally passed the Conference Committee's version, which is substantially the existing law (91 Cong. Rec. 1488 (1945)):

If we do not enact any legislation at this time, the situation will be a very serious one. The

State insurance commissioners do not know what to do. For instance, they do not know whether they can collect taxes or issue permits. The insurance companies do not know whether they can pay taxes. The insurance commissioners do not know whether they can issue regulations. The entire operation of the insurance business is now in more or less a chaotic condition due to uncertainties which require immediate legislative action. We must have some legislation at the earliest possible moment.

The message of this legislative history is clear. Congress did not pass the McCarran-Ferguson Act — and particularly Section 2(b) of that Act — to authorize States in the future to adopt new barriers, for reasons having nothing to do with the integrity or efficiency of the insurance business, to qualified persons or concerns wishing to enter the insurance agency business or to assess novel fines, fees or penalties on particular enterprises or individuals engaged in that business. Congress was concerned with the regulatory structure for the insurance business that a State had created or might create in the future.

Fidelity to that legislative history and to the paramount manifested purpose of Congress requires that Section 626.988 be invalidated. It is simply not a law enacted "for the purpose of regulating the business of insurance" within the contemplation of Section 2(b).

C. Under This Court's Decisions Construing Section 2(b), the Florida Statute Is Not a Law "Regulating the Business of Insurance."

This Court's decisions construing Section 2(b) of the McCarran-Ferguson Act confirm the limited role the Act was intended to play in securing against federal displacement only state legislation that genuinely regulates the business of insurance. Under those decisions, Section 626.988 manifestly does not qualify as a state law "regulating the business of insurance."

(1) *SEC v. National Securities*

In this Court's first decision construing the statutory language at issue here, *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), the Court emphasized that the McCarran-Ferguson Act must be construed in light of its genesis in the controversy that erupted in the wake of *South-Eastern Underwriters*. The Court explained (*id.* at 459-60):

Given [the Act's] history, the language of the statute takes on a different coloration. The statute did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the business of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply.

The Court held that the "core" of the "business of insurance" requirement of Section 2(b) was "[t]he

relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement." 393 U.S. at 460 (quoted in *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2208 (1993)). Thus, a law must do more than simply affect the insurance industry to "regulate the business of insurance" within the meaning of the McCarran-Ferguson Act. It must be directed toward the rights and obligations that arise from the contract between insurer and insured. As a result, the Court held in the *National Securities* case that an Arizona law protecting insurance company stockholders from unfair or unlawful mergers was not enacted to regulate the business of insurance (393 U.S. at 457), but a statute designed explicitly to preserve "the security and service to be rendered policyholders" did regulate the insurance business (393 U.S. at 462).

Here, Section 626.988 plainly does not concern the relationship between insurer and insured, the type of insurance policy that is issued, the rights and obligations of the parties to the insurance contract, or the interpretation and enforcement of such a policy. Hence it is not at the "core" of the statutory phrase as construed in *National Securities*.

(2) *United States Dep't of Treasury v. Fabe*

The only other case in which this Court has directly construed the language of Section 2(b) that may be dispositive here, *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), confirms the limited scope of McCarran-Ferguson's protection of state law, and its inapplicability to Section 626.988.

In *Fabe*, the Court considered whether an Ohio law regulating insurance companies, which conflicted with federal bankruptcy law by assigning the United States a

lower priority than other creditors in an insurance company liquidation proceeding, was a law enacted "for the purpose of regulating the business of insurance." 113 S.Ct. at 2208. After a detailed review of each creditor priority prescribed by the statute, the Court majority concluded that only provisions that directly regulated the insurer-policyholder relationship by providing a preference for the payment of policyholder claims were shielded from pre-emption by the McCarran-Ferguson Act. This conclusion rested on the majority's determination that by directly facilitating the payment of claims to policyholders, the law was "integrally related to the performance of the insurance contract." 113 S. Ct. at 2209. The four dissenters would have read McCarran-Ferguson even more narrowly, holding that even the priority for policyholder claims was pre-empted.

Significantly, the Court unanimously agreed that the priority given by the Ohio law to claims of non-policyholders, such as employees and general creditors, did not further the interests of policyholders so directly as to constitute regulation of the insurance business. While conceding that "every preference accorded to the creditors of an insolvent insurer may redound to the benefit of policyholders by enhancing the reliability of the insurance company," *id.* at 2212, the Court majority held that such indirect benefits to insurers or their policyholders do not suffice to avoid pre-emption under the McCarran-Ferguson Act.

(3) *Royal Drug and Pireno*

Two other decisions of this Court that concern related statutory language — *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982) — confirm the limits on the scope of the protection afforded by the McCarran-

Ferguson Act to state laws regulating the business of insurance. Both decisions involved the proviso to Section 2(b) of the Act, which exempts those engaged in the regulated business of insurance from the federal antitrust laws. This Court's more recent decision in *Fabe*, while noting the distinction between the statutory phrases "law[s] enacted . . . for the purpose of regulating the business of insurance" in Section 2(b) and "the business of insurance" as used in the proviso, holds that the principles of *Royal Drug* and *Pireno* help to define the scope of Section 2(b)'s protection of laws regulating the business of insurance. See *Fabe*, *supra*, 113 S. Ct. at 2209-10, 2212.

In the *Royal Drug* case, the Court considered whether agreements between Blue Shield and certain pharmacies to set the cost of prescription drugs sold to Blue Shield policyholders were part of the "business of insurance" exempted from the antitrust laws by the McCarran-Ferguson Act. Noting that the McCarran-Ferguson Act exempts the "business of insurance" and not the "business of insurers" (440 U.S. at 205), the Court identified three criteria relevant to defining the "business of insurance" (*Pireno*, *supra*, 458 U.S. at 129):

first, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Applying these factors, the majority in *Royal Drug* rejected Blue Shield's contention that the potential benefits that flowed indirectly from the pharmacy agreements to Blue Shield policyholders sufficed to bring the agreements within

the "business of insurance" exemption. 440 U.S. at 216-17. The Court held that the pharmacy agreements met none of the three criteria that define the "business of insurance."

Similarly, in the *Pireno* case, the Court applied the *Royal Drug* criteria to conclude that the use of a "peer review committee" to advise insurance companies whether some chiropractic treatments and fees were "reasonable" and "necessary" was not part of the "business of insurance." See also *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-49 (1987) (applying the *Royal Drug* criteria to determine the scope of the pre-emption savings clause in the Employee Retirement Income Security Act).

(4) The Governing Principle

The legal principle that emerges from these decisions is that a law "enacted . . . for the purpose of regulating the business of insurance" must be directed toward the rights and obligations that arise from the contractual relationship between insurance companies and their policyholders. Legislation that results only in incidental, remote or unintended benefits to policyholders does not qualify for protection under the McCarran-Ferguson Act. This Court has declared that "[a]ncillary activities' that do not affect performance of the contract or enforcement of contractual obligations do not enjoy the anti-trust exemption for laws regulating the 'business of insurance.'" *Fabe*, *supra*, 113 S. Ct. at 2209 (quoting *Pireno*, *supra*, 458 U.S. at 134 n. 8). Likewise, state laws that do not affect the performance or enforcement of the insurance contract or whose "connection to the ultimate aim of insurance is too tenuous" do not "escape pre-emption" by virtue of the McCarran-Ferguson Act. *Fabe*, *supra*, 113 S.Ct. at 2212.

(5) Application to Section 626.988

The Florida law at issue here plainly does not "center around the contract of insurance" or regulate "the relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement" — the subjects this Court has held to be "the core of the 'business of insurance.'" *National Securities, supra*, 393 U.S. at 460. Nor does Florida's prohibition on banks acting as insurance agents "protect policyholders" by regulating "the performance of an insurance contract." *Fabe, supra*, 113 S.Ct. at 2210. Rather, Section 626.988 operates to define the powers of "financial institutions," including national banks and bank holding companies, by restraining these entities from engaging in activities that have long been associated with the business of banking.³ See Fla. Stat. Ann. § 626.988 (1)(a). That purpose is far beyond the range defined by this Court's decisions and it follows, therefore, that the Florida law does not qualify under Section 2(b).

³ State-chartered banks have provided their customers with access to insurance for almost two centuries. See Bray Hammond, *Banks and Politics in America From the Revolution to the Civil War*, 154, 194-95 (1957). In 1916, Congress authorized national banks in small towns to offer this service to their customers. See 12 U.S.C. § 92. Insurance sales since that time, like other financial services that banks may offer, have grown to form a significant aspect of the business of banking.

III.

SECTION 92 "SPECIFICALLY RELATES TO
THE BUSINESS OF INSURANCE"

The McCarran-Ferguson Act shields a state insurance law from pre-emption only if it is not inconsistent with a federal law that "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Even if, contrary to our argument on pp. 17-40, *supra*, this Court were to conclude that Section 626.988 was enacted "for the purpose of regulating the business of insurance," the Florida law must still clear a second hurdle before it can be applied. In this case, that second hurdle becomes virtually insurmountable if the Florida law clears the first. For if a *prohibition* on banks selling insurance *regulates* the "business of insurance," Section 92's *express authorization* of bank insurance sales must at least *specifically relate* to the insurance business under the plain meaning of Section 2(b) of the McCarran-Ferguson Act.

A. The Specific Subject Matter of Section 92
Is Bank Sales of Insurance.

We begin once again with consideration of the language of Section 2(b) and its application to the relevant statute. In construing the extent to which Section 92 retains its pre-emptive effect over conflicting state regulation it is important to bear in mind this Court's instruction that whenever possible, it is appropriate to take "what guidance [is] available from a 'common-sense view' of the language of the [statute] itself." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 (1987). Given the breadth and clarity of the language of Section 92, common sense is all that is required to determine that it "specifically relates to the business of insurance."

Section 92 grants to a defined class of national banking associations the power to "act as the agent for any fire, life, or other insurance company" As the Seventh Circuit recently put it, the statute "identifies a line of business in which national banks may engage." *NBD Bank, N.A. v. Bennett*, No. 95-1310, 1995 U.S. App. LEXIS 27835 at *4. Quite obviously, the statute "specifically relates" to the line of business it authorizes national banks to engage in. If, as the respondents contend, that line of business is part of "the business of insurance," Section 92 necessarily "specifically relates to the business of insurance."

Given the plain meaning of Section 92, the Court need spend no more time on this issue than it spent determining whether the Employee Retirement Income Security Act of 1974 ("ERISA") "specifically relates to the business of insurance" in *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993). In *Hancock*, the Court held simply that: "ERISA, both in general and in the guaranteed benefit policy provision in particular, *obviously and specifically relates to the business of insurance.*" 114 S. Ct. at 525 (emphasis added) (quoting Brief for the United States as *Amicus Curiae* 23, n. 13). The same is true here.

B. The McCarran-Ferguson Act Uses Broad Language in Preserving Federal Legislation that "Specifically Relates" to Insurance.

The Court can avoid giving pre-emptive effect to Section 92 only by reaching the anomalous conclusion that a federal statute which grants certain banks the power to sell insurance does not "specifically relate" to the business of insurance. Such a conclusion would directly conflict with this Court's prior interpretations of the term "relates."

The Court has repeatedly emphasized the expansive meaning of the term "relates" or "relating." In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), the Court considered the breadth of the pre-emption provision in the Airline Deregulation Act of 1978, which pre-empts "any law . . . relating to rates, routes, or services of any air carrier." 49 U.S.C. § 1305(a)(1) (emphasis added). The Court described the "relating to" clause as having a "broad scope," and an "expansive sweep," and as being "conspicuous for its breadth." Accordingly, it held that "to relate" meant "to stand in some relation, to have bearing or concern; to pertain; refer; to bring into association with or connection with." 504 U.S. at 383-84 (quoting Black's Law Dictionary 1158 (5th ed. 1979)).⁴

In *Smith v. United States*, 113 S. Ct. 2050 (1993), which involved a law imposing enhanced penalties on a defendant who "in relation to . . . [a] drug trafficking crime . . . uses . . . a firearm" (emphasis added), the Court also said that "the phrase 'in relation to' is expansive." 113 S. Ct. at 2058. A broad construction was applied in *Smith* despite the time-honored rule that criminal statutes are to be narrowly construed in favor of the defendant. *E.g.*, *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978).

Section 92 clearly "relates" to the business of insurance in the broad sense used in this Court's opinions.

⁴ The Court has construed ERISA's pre-emption of laws that "relate to" employment benefit plans similarly broadly. *See, e.g.*, *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 128 (1992) (citing cases). In *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995), the Court observed that this language clearly covered laws that expressly refer to employee benefit plans (as Section 92 expressly refers to insurance).

When the statute authorizes national banks to engage in that business, the law both refers to the business of insurance and pertains to it. This comports with the definition of the word "relates" in *Webster's New International Dictionary of the English Language*, cited and quoted in the *Smith* opinion, *supra*, 113 S. Ct. at 2059, and in *Black's Law Dictionary*, cited in *Morales*. Moreover, the reference and pertinence to insurance is surely "specific," as the statute expressly addresses insurance sales and describes with particularity the permitted scope of such activities.

C. The Eleventh Circuit's Holding Distorts the Statutory Language.

The court of appeals held that Section 92 did not override Section 626.988 because (1) Section 92 was not intended by Congress to "regulate" insurance and (2) Section 92 did not "specifically require" that a conflicting state law be invalidated. 43 F.3d at 637, Pet. App. 15a. Neither of these reasons justifies the Eleventh Circuit's result.

(1) Specific Rejection of State Law Is Not Required.

The court of appeals has, with its second justification, added a condition to Section 2(b) that the law does not prescribe — *i.e.*, that a federal statute specifically declare that it overrides a contrary state law. Such a statutory requirement initially passed the House and the Senate when the McCarran-Ferguson Act was being debated. Section 2(b) of the bills that went to the Conference Committee provided:

No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which

imposes a fee or tax upon such business, unless such act specifically so provides.

91 Cong. Rec. 329-30 (1945); 91 Cong. Rec. 478-88 (1945) (emphasis added).

The Conference Committee, however, jettisoned the narrow savings clause in favor of an expansive clause that validates any federal statute that "specifically relates to the business of insurance." 91 Cong. Rec. 1935-36 (1945). By making this change, the Conference Committee and the Congress made clear that the savings clause should apply to federal statutes that specifically relate to insurance, whether or not they explicitly declare that they are intended to have pre-emptive effect.

(2) The Federal Law "Relates" to Insurance Regardless of Whether It "Regulates" Insurance.

The other reason stated by the court below — that Section 92 could not "regulate" the business of insurance because it was passed at a time when Congress believed it lacked such regulatory authority under the Commerce Clause — is simply a *non sequitur*. The McCarran-Ferguson Act recognizes the validity not only of federal statutes that "regulate" the business of insurance, but of all federal statutes that "specifically relate" to that business. Even if Congress believed in 1916 that it lacked power under the Commerce Clause to enact comprehensive "regulation" of the business of insurance, it was not disabled from passing a law that "related" to that business if, as was true of Section 92, it came, as did other national banking legislation, within the Necessary and Proper Clause. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); cf. *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 303 (1935). The

Eleventh Circuit may be accurate in stating that the 1916 Congress was "concerned with banking" when it passed Section 92. But the law nonetheless *relates* to insurance.

The Eleventh Circuit's reasoning would mean that *no* federal law enacted before *South-Eastern Underwriters* could be validated as a law that "specifically relates to the business of insurance." Such an interpretation of the McCarran-Ferguson Act is contrary not only to its plain language, but also to the clearly expressed views of its sponsors. Senator Ferguson, one of the Act's principal architects, stated expressly that the savings clause was intended to confirm federal statutes then on the books, provided that they were specifically related to the business of insurance. During the debate on the Senate bill, Senator Murdock asked Senator Ferguson whether Section 2(b) applied to federal statutes then in existence as well as to those that might be passed in the future. 91 Cong. Rec. 479 (1945). Senator Ferguson replied that it applies to *all* statutes "specifically relating to insurance." *Id.*

This is how the savings clause has been interpreted by a number of other courts of appeals. In *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406, 1414-15 (5th Cir. 1987), *rev'd on rehearing on other grounds*, 862 F.2d 491, *cert. denied*, 490 U.S. 1035 (1988), the court held that the Longshoremen and Harbor Workers Compensation Act, including the penalty provisions in Section 14 (33 U.S.C. § 914) that were passed in 1927, "specifically relates to the business of insurance." Likewise, Section 832(c) of the Internal Revenue Code, which defines "insurance company income," and originally appeared in the Revenue Act of 1942, was found to pass the "specifically relates" test in *Hanover Ins. Co. v. Commissioner*, 598 F.2d 1211 (1st Cir.), *cert. denied*, 444 U.S. 915 (1979). Finally, the National Service Life Insurance Act of 1940, Ch. 757, §

601, 54 Stat. 1008 (repealed 1958), which was passed well before 1945, dealt solely with the business of insurance. This Court had no trouble finding the Act constitutional (*Wissner v. Wissner*, 338 U.S. 655 (1950)), and its provisions would unquestionably be found to relate specifically to the business of insurance if tested under the McCarran-Ferguson Act.

For all these reasons, the Court should reach the conclusion dictated by the plain language of the McCarran-Ferguson Act and by Section 92 and by common sense — that *even if* Florida's *prohibition* on bank sales of insurance is a regulation of the "business of insurance," it necessarily follows that Section 92's *express authorization* of such sales "specifically relates to the business of insurance."

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals and remand the case for entry of final declaratory and injunctive relief in favor of Barnett Bank on the question whether 12 U.S.C. § 92 pre-empts Fla. Stat. Ann. § 626.988.

Respectfully submitted,

NATHAN LEWIN

(Counsel of Record)

SCOTT L. NELSON

J. BRADLEY BENNETT

JAMES R. HEAVNER, JR.

MILLER, CASSIDY,

LARROCA & LEWIN

2555 M Street, N.W.

Washington, D.C. 20037

(202) 293-6400

RICHARD E. SWARTLEY

General Counsel

BARNETT BANKS, INC.

50 N. Laura Street

Jacksonville, FL 32202

(904) 791-7505

November 1995

Attorneys for Petitioner

APPENDICES

APPENDIX A
(CONSTITUTIONAL AND STATUTORY PROVISIONS)

1. The Supremacy Clause of the United States Constitution (art. VI, cl. 2) provides in pertinent part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land

....

2. 12 U.S.C. § 92, 39 Stat. 753 (1916), provides:

In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided,*

however, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

3. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1012, 59 Stat. 34 (1945), provides in pertinent part:

§ 1011. Declaration of policy

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal Regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

4. Florida Statutes Annotated § 626.988 provides in pertinent part:

626.988. Financial institutions; agents and solicitors prohibited from employment; exceptions

(1) For the purpose of this section, the following definitions shall apply:

(a) "Financial institution" means any bank, bank holding company, savings and loan association, savings and loan association holding company, or savings and loan association service corporation or any subsidiary, affiliate, or foundation of any of the foregoing. This definition shall not,

however include any financial institution which has been granted an exemption by the Board of Governors of the Federal Reserve System pursuant to s. 4(d) of the federal Bank Holding Company Act of 1956, as amended,[] or any financial institution which neither owns more than 10 percent of the capital stock, nor exercises effective control, of a bank, savings and loan association, or entity licensed under chapter 494 and licensed or authorized to transact business in this state. Specifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census.

(b) "Insurance agency activities" means the procurement of applications for, or the solicitation, negotiation, selling, effectuating, or servicing of, any policy or contract of insurance other than credit life insurance and credit disability insurance.

* * *

(2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

APPENDIX B
(COMMITTEE SUBSTITUTE FOR H.B. 3152
3RD FLA. LEG., 2D SESS. (1974))

A bill to be entitled

An act relating to insurance; creating §626.988, Florida Statutes; prohibiting insurance agents and solicitors associated with certain financial institutions from soliciting, negotiating, selling, effectuating or servicing any policy of insurance; providing exceptions with respect to certain types of insurance and certain agents and solicitors so engaged on April 2, 1974; providing an effective date.

WHEREAS, there is now pending before the Board of Governors of the Federal Reserve System various applications by bank holding companies to engage in the insurance agency business, and

WHEREAS, an administrative law judge has prepared a recommended decision for consideration by the Federal Reserve Board which enumerates the anticipated adverse effects on the public of the entry of bank holding companies into insurance agency activities, but recommends that the applicants to be authorized to engage in such activities in a limited manner and subject to various restrictions, and

WHEREAS, after hearing an exhaustive presentation of evidence, the administrative law judge reached various conclusions concerning the bank holding company applicants, among them are the following:

- a) "... [T]he entry of large banking institutions into the insurance agency business in areas where the banks have a large concentration of resources would result in the demise of small insurance agencies or their transformation into large combinations. This would decrease competition within the insurance industry and reduce the opportunity for youths, veterans and women to gain a foothold in a business in which ultimately they could participate as owners or managers."
- b) "... [W]hile there is a minor convenience in bank affiliated insurance agency sales in the case of personal lines such as automobile and homeowner's coverages, the convenience advantage in the case of commercial financing - insurance appears insignificant."
- c) "... [I]t appears that the gains in efficiency [by] the bank affiliated insurance agencies will largely benefit the applicants in terms of larger-scale operating economies," and "Based upon their record of maximum charges for credit life insurance it is not reasonable to expect that the applicants will voluntarily lower premiums in other fields of insurance."
- d) "... [W]hile it is difficult to accurately measure the psychology of voluntary tying, nevertheless the weight of evidence realistically evaluated suggests that in times of scarcity of lending funds, the average borrower finds himself in a weakened bargaining position vis-a-vis the lender and

the offer of insurance placement is another device along with compensating balances and utilization of other banking services with which the borrower can increase the probability that a needed loan will be granted."

- (e) "... [S]ince banks are predominantly the depositaries of 'other peoples' money, 'therefore they should not be in competition with their depositors.'"

and,

WHEREAS, the undue concentration of economic resources, a substantial decrease in competition among insurance agents, unfair competition, conflicts of interest and voluntary tying are against the public policy of the state and against the best interests of the people of Florida, and

WHEREAS, other financial institutions which enter insurance agency activities will cause the same results as the entry of bank holding companies into such activities, and

WHEREAS, the United States Congress by the Federal Bank Holding Act of 1956, 12 USCA §1846, specifically reserved to the states the power and authority to enact legislation with respect to bank holding companies, and

WHEREAS, to preserve the public policy and protect the public interest insurance agents and solicitors should be prohibited from soliciting, negotiating and selling insurance contracts if employed by, associated or affiliated in any way with specified institutions, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 626.988, Florida Statutes, is created to read:

626.988 Financial institutions; agents and solicitors prohibited from employment; exceptions.--

(1) For the purpose of this section the following definitions shall apply:

(a) "Financial institution" means any bank, bank holding company, savings and loan association, savings and loan association holding company, savings and loan association service corporation, and any subsidiary, affiliate, employees' trust or foundation of any of the foregoing. This definition shall not, however, include any financial institution which has been granted an exemption by the Board of Governors of the Federal Reserve System pursuant to Section 4(d) of the Federal Bank Holding Company Act of 1956, as amended, or any financial institution which neither owns more than ten percent (10%) of the capital stock nor exercises effective control of a bank, savings and loan association or entity licensed under chapter 494, Florida Statutes, which is licensed or authorized to transact business in Florida. Specifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than five thousand (5,000) according to the last preceding census.

(b) "Insurance agency activities" means the procurement of applications, solicitation, negotiation, selling, effectuating or servicing of any policy or contract of

insurance other than credit life insurance and credit disability insurance.

(c) "Financial institution agency" means any person, firm, partnership or corporate entity which is engaged in insurance agency activities, as herein defined, and is associated with, owned, controlled, employed or retained by a financial institution as herein defined.

(2) No insurance agent or solicitor licensed by the department of insurance under the provisions of chapter 626, Florida Statutes, who is associated with, under contract with, retained by, or owned or controlled to any degree directly, or indirectly, or who is employed by a financial institution shall engage in insurance agency activities as an employee, officer, director, agent or associate of a financial institution agency.

(3) The department of insurance shall not grant, renew, continue or permit to exist any license as such agent or solicitor as to any applicant therefor or licensee thereunder if it finds that the license has been or is being or will probably be used by the applicant or licensee for any purpose prohibited by this section.

(4) Notwithstanding any provision of this section the department of insurance shall permit the continued operation under the same ownership and control of all financial institution agencies which were in existence and engaged in insurance agency activities as of April 2, 1974. To make possible such continuation the department of insurance may license agents and solicitors who are otherwise qualified, as successors to those agents and solicitors who are exempt from the provisions of this section, and their successors, for so long as the specific financial institution agency continues to function as it was constituted

on April 2, 1974; provided, however, that no agent or solicitor so licensed under this section shall be permitted to be employed, or controlled to any degree, directly or indirectly, by any financial institution agency except the particular agency for which he was so licensed as a successor for the purposes of this section.

(5) This section shall not prevent an agent or solicitor from serving as an officer or director of a financial institution, provided that he conducts all of his insurance activities free of ownership or control of the financial institution, and, provided further that the financial institution does not participate directly or indirectly in the earnings from his insurance activities.

(6) This section shall not apply to agents or solicitors who were engaged as of April 2, 1974, in activities prohibited by this section and who have been continuously so engaged since that date, but only with respect to the specific type of license held and the financial institution with which the agent or solicitor was associated on said date.

Section 2. This act shall take effect upon becoming a law.

No. 94-1837

Supreme Court, U.S.
FILED

DEC 8 1995

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

**BILL NELSON, INSURANCE COMMISSIONER OF
THE STATE OF FLORIDA, FLORIDA DEPARTMENT
OF INSURANCE, FLORIDA ASSOCIATION OF LIFE
UNDERWRITERS, PROFESSIONAL INSURANCE AGENTS
OF FLORIDA, INC., AND FLORIDA
ASSOCIATION OF INSURANCE AGENTS,**

Respondents.

**On Writ Of Certiorari To The United States
Court Of Appeals For The Eleventh Circuit**

**BRIEF FOR RESPONDENTS BILL NELSON
AND THE FLORIDA DEPARTMENT OF INSURANCE**

DAVID J. BUSCH*

DANIEL Y. SUMNER

General Counsel

DENNIS SILVERMAN

KAREN ASHER-COHEN

**FLORIDA DEPARTMENT
OF INSURANCE**

200 E. Gaines Street

Tallahassee, FL 32399-0333

(904) 413-4146

Attorneys for Respondents

Bill Nelson and the Florida

Department of Insurance

**Counsel of Record*

Reiner Legal Publishing Department, Washington, D.C. (202) 682-9800

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QUESTIONS PRESENTED

The Department is dissatisfied with the phrasing of the Questions Presented by Barnett, and submits its phrasing of the Questions Presented in the following order:

1. Whether Florida's Section 626.988, which prohibits insurance agents or solicitors associated or affiliated with financial institutions from engaging in insurance agency activities, is a law enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).
2. Whether 12 U.S.C. Section 92 is an "Act [that] specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).
3. Whether a federal statute that gives a national bank located and doing business in any place the population of which does not exceed 5,000 inhabitants, permission to sell insurance (12 U.S.C. § 92) preempts Florida's Section 626.988 in that it prohibits subsidiaries of bank holding companies from engaging in insurance agency activities.

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following regulatory provision should be added to the four provisions contained in Barnett’s brief:

5. The Comptroller of the Currency, Department of Treasury Interpretive Ruling, codified at 12 C.F.R. § 7.7100 (1995), provides:

12 U.S.C. 92 provides that national banks may act as agents for any fire, life, or other insurance company in any place the population of which does not exceed 5,000 inhabitants. This provision is applicable to any office of a national bank when the office is located in a community having a population of less than 5,000 even though the principal office of such bank is located in a community whose population exceeds 5,000.

STATEMENT

Petitioner Barnett Bank of Marion County ("Barnett" or "the bank") is a subsidiary of the largest bank holding company headquartered in the state of Florida, and one of the largest bank holding companies in the southeastern United States. R. 3-62, pp. 1, 3, ¶¶ 5, 24, 25. The bank has its principal place of business in Ocala, Florida, but owns and operates a branch bank located in Belleview, Florida. R. 3-62, p. 1, ¶¶ 2, 3. On October 18, 1993, Barnett purchased Linda Clifford Insurance, Inc. ("LCI"), a general lines insurance agency operating in Belleview, Florida, a place of less than 5,000 inhabitants. Linda Clifford and the other agents employed by LCI then became employees of Barnett. R. 3-62, pp. 1, 2, ¶¶ 6-8.

I. Regulatory Background

A. Federal

The principle that regulation of insurance lies with the states was recognized by this Court in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868). The Court held that one of Virginia's insurance regulatory statutes did not violate either the Commerce Clause or the Privileges and Immunities Clause of the United States Constitution.

Seventy-five years later, in *U.S. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the Court upheld an Act of Congress regulating methods by which interstate insurance companies did business, thereby deciding that the Commerce Clause grants Congress the power to regulate interstate insurance transactions. Prior to 1944, Congress at no time attempted to control the business of insurance, as it was considered outside the Commerce Clause powers. Congress responded to *South-Eastern Underwriters* by passage of the McCarran-Ferguson Act, the second section of which provides that "[t]he business of insurance, and every person

engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(b).

B. Florida

For over twenty years Florida has prohibited its licensed insurance agents from engaging in "insurance agency activities" while they are "associated with ... or controlled by" a "financial institution" as those terms are defined in Section 626.988(1) and (2).¹ Excluded from this prohibition is "any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000." Fla. Stat. Ann. § 626.988(1)(a).

II. Barnett initiates litigation.

After purchase of LCI, Barnett sought a declaratory judgment from the United States District Court for the Middle District of Florida to allow the bank to market insurance to existing and potential customers, regardless of where located, from its branch office in Belleview, Florida. Barnett sued then Florida Insurance Commissioner Tom Gallagher and the Florida Department of Insurance (collectively "the Department") on the theory that 12 U.S.C. § 92 preempted Sections 626.988(1)(a) and (2), Florida Statutes (1993), Pet. 3-5.

The Department issued an administrative Immediate Final Order (IFO) (R. 1-5, Ex. D), directing Linda Clifford and her associate insurance agents to cease and desist from insurance agency activities, other than the selling of credit life and credit disability insurance, which are exempted from the definition of "insurance agency activities." Fla. Stat. Ann. § 626.988(1)(b).

¹ Section 626.988 is part of Florida's Unfair Insurance Trade Practices Act, which has as its stated purpose "to regulate the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Pub. L. No. 15, 79th Congress)..." i.e., the McCarran-Ferguson Act. See Fla. Stat. Ann. § 626.951(1).

Barnett filed a motion for a temporary restraining order in the District Court seeking to enjoin the Department from enforcing the IFO.

III. The Federal District Court hears trial testimony as to the purpose of 626.988.

The District Court denied Barnett's motion for a temporary restraining order and set a bench trial. Barnett argued that Florida had placed a "precatory gloss" on Section 626.988 "by attaching labels and proffering expert testimony" designed to give the false impression that 626.988 is consumer protection legislation. R. 3-43, Mem. p. 7. This attack on the State's asserted purpose of Section 626.988 raised a significant factual issue: Whether Section 626.988 had actually been enacted and applied as consumer protection legislation. The Department argued that determination of that issue was essential to the trial court's proper resolution of the preemption issue. R. 3-60, p. 3.

Aside from a joint stipulation of facts filed by the parties (R. 3-62), the only evidence introduced at trial was by the Department through Donald A. Dowdell and Douglas A. Shropshire, two Senior Department officials most familiar with the purposes and current enforcement of Section 626.988. The bank's position at trial was: "We don't have any testimony to put on." (TR-4).

The purposes of Section 626.988, as determined by the Florida Legislature and Florida's trial and appellate courts, are to: (1) prevent coercion of insurance consumers through the express or implied force of credit; (2) prevent the undue concentration of economic resources; and (3) prevent unfair trade practices in the transaction of insurance. These three purposes can be found in the legislative history of the statute, case law, and from the Department's experience in administering Section 626.988 and related provisions.

The Department's experience has shown that the three purposes, acknowledged as valid in *Glendale Fed. Sav. & Loan Ass'n v. Dep't of Ins.*, 587 So.2d 534, 536 (Fla. 1st DCA 1991), rev. den., 599 So.2d 565, and *Production Credit Ass'n of Fla. v. Dep't of Ins.*, 356 So.2d 31 (Fla. 1st DCA 1978), are "real concerns." Mr. Shropshire testified, "yes, we absolutely found all three of those elements to be present dangers to policyholders and to the solvency of the company." (TR-81)

Addressing each concern individually, the Department's unrebutted testimony established that the danger of the inherent coercive power of credit is a well-recognized problem. Bank customers seeking, for example, an auto loan or home mortgage may be steered by bank employees to insurance products offered by the bank or through an insurance agency operating in association with the bank. The granting of the loan is then directly or indirectly tied to the purchase of insurance. Witness Shropshire testified that he has seen "convincing extensive evidence of an intentional business arrangement to mislead policy holders and prospective policy holders as to the nature of the product they were buying." (TR-77-78.)

Second, with regard to safeguarding solvency by preventing the undue concentration of economic resources, the Department's experience has shown that third-party interests who have access to large customer bases and the huge premium writings generated thereby, possess sufficient leverage to dictate financial decisions of insurers to such an extent that insurers may become insolvent as a result. (TR-25.)

This problem is not unique to agents operating in association with financial institutions. Similar concerns are addressed by Florida's producer-controlled insurer statute, the managing general agent law, and the holding company statute. All of these business relationships may lead to the problem of reverse competition, whereby vendors and lenders controlling large blocks of business dictate commission pricing to insurers dependent on

that cash flow. Instead of commission levels being driven by standard free-market pricing, insurers "leapfrog" each other, offering progressively higher commission levels to producers of large blocks of business. (TR-37-38.)

Florida's experience with credit life insurance, a product marketed through financial institutions and exempted from the prohibitions of Section 626.988, shows actual commission levels of eighty percent, leaving only twenty percent for the payment of claims. By way of comparison, health insurance and property and casualty insurance loss ratios are typically the exact opposite — administrative expenses are around thirty percent, leaving approximately seventy percent of premium dollars to pay claims. While Section 626.988 has generally served to limit such abuses by financial institutions in the marketing of insurance, the notable exceptions to the prohibitions of Section 626.988, credit life and credit disability insurance, are where Florida has encountered problems. (TR-36-38.)

Third, with regard to preventing unfair trade practices, the Department's unrebutted testimony established that recent Department investigations had revealed extensive evidence of intentional business arrangements whereby banks sought to mislead policyholders and prospective policyholders that the insurance product they were buying was a bank product. The product would be "dressed up" to appear as a bank investment when in reality the product was insurance sold by an insurance agency. Florida's elderly population is particularly susceptible to being thus misled. (See *Barnett*, 839 F.Supp. at 842, for the District Court's concurrence with the Department's concerns.) (TR-81-82.)

Department investigations revealed that when banks operate contrary to Section 626.988, it is not uncommon to find the bank utilizing its employees to solicit prospective policy-

holders. Section 626.988 prevents such unlicensed activities. (TR-79.)

IV. The District Court finds the Florida law was enacted for the purpose of regulating the business of insurance.

The District Court's order (Pet. App. at 26a-31a), answers the following inquiry:

Under McCarran-Ferguson, then, the Court's initial inquiry must be to determine whether section 626.988 is a law enacted by the State of Florida "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

(Pet. App. at 26a.) The McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, insulates state laws from challenges of preemption under the Supremacy Clause when state laws are enacted for the purpose of regulating the business of insurance. Relying on trial testimony set forth above, express State legislative intent, two State appellate decisions, and guided by this Court's decisions in *United States Dep't of Treasury v. Fabe*, 508 U.S. ___, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993), and *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453 (1969), the District Court held that Section 626.988 is a law enacted by the State of Florida for the purpose of regulating the business of insurance.

The District Court found the State's concerns to be legitimate in that the statute indirectly protects the relationship between insurer and insured by protecting the insurance-purchasing public. The Court found the law "furthers the interest" of the potential policyholding public, and therefore, is a "law enacted for the purpose of regulating the business of insurance" within the meaning of McCarran-Ferguson. *Fabe*, 113 S.Ct. at 2208.

V. The District Court concluded that 12 U.S.C. § 92 is not "specifically related to the business of insurance."

After concluding from the evidence that Section 626.988 is a law enacted for the purpose of regulating the business of

insurance, the trial court determined the "effect, if any, of Section 92 of the Federal Reserve Act." *Barnett Banks of Marion County, N.A. v. Gallagher*, 839 F.Supp. 835, 842 (M.D. Fla. 1993). Pet. App. 32a. The Court noted that Barnett "has consistently stated and/or conceded that Section 92 is a "bank" law, and has premised its argument accordingly." *Barnett*, 839 F.Supp. at 839, Pet. App. 25a, n.3. The Court, relying on *Fabe*, 113 S.Ct. at 2211, looked to whether Section 92 "specifically requires" that a conflicting state statute yield. *Barnett*, 839 F.Supp. at 842, Pet. App. 32a. The District Court concluded "that § 92 neither 'specifically relates to the business of insurance,' 15 U.S.C. § 1012(b), nor 'specifically requires,' *Fabe*, 113 S.Ct. at 2211, that apparently conflicting state laws be preempted." (Pet. App. at 35a). Finding that Florida's statute is saved from preemption as a result of the McCarran-Ferguson Act, the District Court entered an opinion and order denying Barnett any injunctive or declaratory relief. *Barnett*, 839 F.Supp. at 843, Pet. App. 35a-36a.

VI. The Court of Appeals for the Eleventh Circuit affirms.

The Eleventh Circuit affirmed after reviewing the District Court's fact findings for clear error, noting "none of the parties allege[d] the trial court erred in its fact-finding." *Barnett Bank of Marion County, N.A. v. Gallagher*, 43 F.3d 631, 634 (11th Cir. 1995), Pet. App. 7a. Accepting the uncontradicted evidence that Section 626.988 was enacted for the protection of Florida policyholders, the Eleventh Circuit applied this Court's "relationship" test in *Fabe*, as taken "directly from" *SEC v. Nat'l Sec., Inc.*, 393 U.S. at 460. *Barnett*, 43 F.3d at 635, Pet. App. 10a.

Upon a *de novo* review of the record, including state court interpretations of the statute, the unrebutted testimony of the Department's witnesses, reference in the Florida Statute to McCarran-Ferguson and this Court's explicit instruction in *Nat'l Securities* and *Fabe*, the Eleventh Circuit concluded that

Section 626.988 regulates the business of insurance because it protects policyholders. 43 F.3d at 636, Pet. App. 12a-13a.

The Eleventh Circuit then reviewed Section 92 and concluded that Section 92 "neither 'specifically relates to the business of insurance,' 15 U.S.C. 1012(b), nor 'specifically requires' *Fabe*, 113 S.Ct. at 2211, that apparently conflicting state laws be preempted." 43 F.3d at 637, Pet. App. 15a. "[U]nder the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interest of policyholders." *Fabe*, 113 S.Ct. at 2208. 43 F.3d at 636, Pet. App. 15a.

SUMMARY OF ARGUMENT

The Court should affirm the decisions of the lower Federal courts and find that the State of Florida has lawfully prohibited insurance agent employees of Barnett from transacting insurance at the Belleview, Florida branch office.

Regulation of the business of insurance is a legitimate, traditional role of the states. The Florida Legislature can best enact an insurance regulatory scheme that addresses Florida's unique insurance and demographic needs. Limitations on the circumstances under which licensed agents may transact insurance are fully consistent with legitimate state interests. Congress recognized that state regulation of insurance is in the public interest by enacting the McCarran-Ferguson Act and creating a "reverse preemption" doctrine for insurance regulation. Congress thus reserved to the states the regulation of the business of insurance.

Section 626.988, contained in Part X of the Unfair Trade Practices section of the Florida Insurance Code, is fully consistent with the McCarran-Ferguson Act's protection of legitimate State interests. The purpose of the statute has been extensively examined in Florida courts, and in the federal courts below. It has been consistently found to regulate an essential part of the

business of insurance — the relationship between insurers and policyholders.

The District Court and the Eleventh Circuit Court of Appeals properly relied on extensive State jurisprudence and uncontroverted expert testimony regarding the statute's goals of preventing coercion, unfair trade practices, and the undue concentration of resources. Recent Florida administrative cases confirm the real world problems which arise when tie-in arrangements occur between banks and insurance agents. Regulation of the point-of-sale transaction between the agent and the consumer is clearly at the heart of the business of insurance.

The lower courts correctly determined that Section 92 of the Federal Reserve Act does not specifically relate to the business of insurance so as to preempt Section 626.988. Section 92, which travels with the other provisions of the 1916 amendment of the Federal Reserve Act, relates to the business of banking.

In the 1916 amendments to the Federal Reserve Act, including Section 92, Congress intended to regulate banks and not insurance. Indeed, it was not until 1944 that a federal role in insurance regulation was even contemplated. Furthermore, even if Section 92 involves insurance, it does not specifically relate to the business of insurance as required by this Court in *Fabe*.

This Court has recently confirmed that Section 92 is part of the Federal Reserve Act, based on an extensive review of the subject matter and location of the statute. Federal and state courts have consistently found that Section 92 does not specifically relate to the business of insurance and was enacted as a banking law.

McCarran-Ferguson's "reverse-preemption" doctrine effectively imposes a "clear-statement" rule applicable to federal statutes which might otherwise preempt contrary state laws.

Section 92 fails to have the preemptive power required to reinstate its supremacy over a Florida law which would otherwise be "exempt" from preemption as a law which regulates the business of insurance.

As to Issue III, the Department adopts the traditional preemption argument set out fully in the Brief of the Florida Association of Life Underwriters, et al.

In sum, Barnett is asking this Court to recreate history. Barnett's entire case is based on its disbelief of the Department's uncontroverted expert testimony at trial and the findings of lower federal courts, state courts and administrative hearing officers. Barnett did not attempt to put on a single witness or introduce even one exhibit at trial. After losing in the courts below, Barnett's strategy is to convince this Court to disregard the existing record—a record of uncontradicted testimony, state legislative intent, Congressional intent, departmental expertise, actual experience in Florida, and State and Federal cases squarely on point. This Court, upon review of the record, will conclude that the weight and persuasiveness of the evidence cannot be disregarded.

ARGUMENT

I. The District Court And The Eleventh Circuit Correctly Found That Section 626.988 Is A Law Enacted "For The Purpose Of Regulating The Business Of Insurance" Under The McCarran-Ferguson Act.

A. McCarran-Ferguson Act Overview

Congress, through enactment of the McCarran-Ferguson Act, has principally reserved to the states regulation of the business of insurance. It is well-settled that there is a strong presumption against imputing to Congress an intention to preempt an area that traditionally has been left to State regulation. *Jones v. Rath Packing Company*, 430 U.S. 519, 525 (1962). The "business of insurance" is such an area. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 480 (1946).

Section 1012 of McCarran-Ferguson Act provides in part as follows:

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. Provided, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law. (emphasis supplied).

Barnett attempts to reargue the congressional intent underlying McCarran-Ferguson. However, this Court in *Prudential v. Benjamin* has already obviated the need for such an analysis noting:

It is not necessary to spend much time with interpreting the McCarran Act. Pertinently it is as follows:

* * *

Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. One was by removing obstructions which might be thought to flow from its own power, *whether dormant or exercised*, except as otherwise expressly provided in the Act itself or in future legislation.

* * *

Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.

Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-430 (1946) (emphasis added). See also *Western and Southern Life Ins. Co. v. Bd. of Equalization of Calif.*, 451 U.S. 648 (1981); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

State laws which regulate the relationship between insurer and policyholder are laws regulating the business of insurance. In *SEC v. Nat'l Securities, Inc.*, *supra*, this Court explained what types of state laws fell within McCarran-Ferguson's ambit of protection:

The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the “business of insurance.” Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was — *it was on the relationship between the insurance company and the policyholder*. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the ‘business of insurance’.

393 U.S. at 459-60 (emphasis added).

Barnett contends that the test of whether a state law regulates the “business of insurance”, and is thus entitled to McCarran-Ferguson protections is governed by *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). However, *Pireno* established a three-part test to determine whether insurer activity is subject to antitrust scrutiny. The *Pireno* test is not applicable to analysis of whether a state law is enacted “for the purpose of” regulating the business of insurance. This Court recently addressed this point in *United States Dep't of Treasury v. Fabe*, *supra*, 113 S.Ct. 2202, 2211.

The Court in *Fabe* distinguished between the first clause of Section 2(b) which exempts those state laws from preemption which were “enacted . . . for the purpose of regulating the business of insurance, from the second clause which exempts only “the business of insurance” from federal antitrust laws.” *Id.* at 2209. This Court therefore limited the reach of *Pireno* to determining the scope of an insurer's antitrust immunity under McCarran-Ferguson, stating:

Both *Royal Drug* and *Pireno*, moreover, involved the scope of the antitrust immunity located in the *second* clause of § 2(b). We deal here with the *first* clause, which is not so narrowly circumscribed. The language of § 2(b) is unambiguous: the first clause commits laws “enacted . . . for the purpose of regulating the business of insurance” to the States, while the second clause exempts only “the business of insurance” itself from the antitrust laws. To equate laws “enacted . . . for the purpose of regulating the business of insurance” with the “business of insurance” itself, as petitioner urges us to do, would be to read words out of the statute. This we refuse to do.

Id.

Using the *National Securities* test for determining whether a state law was “enacted for the purpose of regulating the business of insurance” under the first clause of McCarran-Ferguson, and limiting the *Pireno* test of the “business of insurance” to antitrust

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No. 94-1837

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA,
FLORIDA DEPARTMENT OF INSURANCE,
FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC.,
AND FLORIDA ASSOCIATION OF INSURANCE AGENTS,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE PETITIONER

RICHARD E. SWARTLEY
General Counsel
BARNETT BANKS, INC.
50 N. Laura Street
Jacksonville, FL 32202
(904) 791-7505

NATHAN LEWIN
(*Counsel of Record*)
SCOTT L. NELSON
J. BRADLEY BENNETT
JAMES R. HEAVNER, JR.
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner

(i)

QUESTIONS PRESENTED

1. Whether a federal statute that gives a national bank operating in a town with a population not exceeding 5,000 the right to sell insurance (12 U.S.C. § 92) preempts a state law that prohibits such a bank from selling insurance.

2. Whether a state law prohibiting banks from selling insurance is a law enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

3. Whether 12 U.S.C. § 92 is an "Act [that] specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

(ii)

LIST OF PARTIES

The caption of this case reflects the substitution of Bill Nelson, current Insurance Commissioner for the State of Florida, for his predecessor, Tom Gallagher. Otherwise, the names of all parties to the proceeding below appear in the caption of this case.

A list of parent companies and wholly owned subsidiaries of the petitioner Barnett Bank of Marion County, N.A., is provided in the petition for writ of certiorari at page ii.

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<i>United States v. South-Eastern Underwriters Ass'n</i> , 322 U.S. 533 (1944)	passim

immunity under the second clause of McCarran-Ferguson is necessary if the first clause is to offer protection to most insurance consumer protection laws.

The *National Securities* test, which looks to the insurer-policyholder relationship, contemplates a "public action" perspective whereby states enact laws to adjust, manage or control this relationship. On the other hand, the *Pireno* test, by looking to: (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and insured; and (3) whether the practice is limited to entities within the insurance industry; contemplates a "private action" perspective whereby an insurer's practices are examined to determine if antitrust immunity applies to that action.

The "business of insurance" under the *Pireno* test, focusing on an insurer's practices to determine if that insurer is acting within the confines of the antitrust immunity granted by the second clause of McCarran-Ferguson, does not contemplate the broader context of regulation of the elements of the business of insurance.

Therefore, the proper inquiry is whether Section 626.988, under the holdings of *National Securities* and *Fabe*, is a law enacted "for the purpose of regulating the business of insurance" by regulating the insurer-policyholder relationship. Even if *Pireno* were applicable, Section 626.988 satisfies that test because it is critical to the relationship between the insurer and insured.

The practical effect of the McCarran-Ferguson Act is that each state can enact laws to regulate the business of insurance in keeping with the particular needs and conditions in that state. The result is a diverse set of insurance regulatory schemes (with many similarities) reflecting the perspective of each individual state. One of the strengths of state regulation of the business of insurance is that a state's regulatory regime can be focused on

the unique circumstances of that particular state. In this regard, it is important to keep in mind that Florida's insurance regulatory laws were enacted to apply to Florida's (and only Florida's) insurance environment. The context within which to view the Florida Legislature's aim in enacting 626.988 is Florida's unique demographic composition. Florida's large population of senior citizens and newcomers to the state (from other states and other countries) are especially vulnerable to coercion or unfair trade practices.

B. Section 626.988 Is Part Of A Comprehensive Legislative Scheme That Protects Policyholders And Was Enacted For The Purpose Of Regulating The Business Of Insurance.

Appellants characterize Section 626.988, Florida Statutes, as a "bare pin-pointed prohibition, not part of a scheme of regulation." (Barnett Br. p. 13) Nothing could be further from the truth. Section 626.988 is an important element of a comprehensive regulatory scheme (the Florida Insurance Code) enacted for the purpose of protecting the Florida insurance-buying public. Section 626.988 is contained in Florida's Insurance Code in Part X of Chapter 626, Florida Statutes. Part X is entitled the "Unfair Insurance Trade Practices Act" and was enacted to implement the legislative intent of Congress in passing the McCarran-Ferguson Act.

The practices prohibited in Part X of Chapter 626 are those unfair and deceptive acts which occur during the solicitation, negotiation, effectuation, and servicing of insurance contracts. Thus, the provisions of Part X (of which 626.988 is a part), necessarily regulate the relationship between insurance companies and current and prospective policyholders in order to prevent unfair methods of competition, and unfair or deceptive acts or practices. The regulated activities extend to agents, insurers, and all other persons involved in the relationship between the

insurance company and the policyholder. See, e.g., Fla. Stat. Ann. § 626.9511(1).

In Florida, soliciting, negotiating, effectuating, and servicing of insurance policies for current or prospective policyholders must be accomplished through agents licensed by the Department. For example, Section 626.041, Florida Statutes, requires that only licensed agents may: solicit insurance or procure applications, receive insurance premiums on behalf of an insurer, deliver any insurance contract or any renewal thereof, analyze insurance policies or give opinions with respect thereto, or in any way cause to be effected any insurance contract. Similarly, Section 624.425, Florida Statutes, requires that an insurance policy may be issued only through a licensed agent.

Because an insurance company can only act through agents licensed by the State of Florida to solicit and service insurance policies, laws which govern agent activities and proscribe various unfair and deceptive trade practices in connection with the solicitation, negotiation, and effectuation of the insurance contract are laws enacted for the purpose of regulating the business of insurance. By regulating the relationship between the insurance company and policyholders carried out through insurance agents, Florida has enacted statutes which fall within the class of statutes described in *Nat'l Securities*, and *Fabe*. The question then becomes whether 626.988 was enacted to be part of this system.

C. It Has Been Well Established That 626.988 Was Enacted To Avoid Unfair Trade Practices, Coercion, And Undue Concentration Of Resources.

The need to ascertain the aim of the Legislature in enacting a particular law for McCarran-Ferguson analysis requires what is essentially a "state-by-state" and "case-by-case" process. Barnett, in its brief at page 11, refers to the decision of the Sixth Circuit in *Owensboro National Bank v. Stephens*, 44 F.3d 388

(6th Cir. 1994), as a "contrary decision" which was "ignored" by the Eleventh Circuit. However, the holding in *Owensboro* in no way controls the result in the instant case, as the 11th Circuit properly found. Barnett fails to recognize that the *Owensboro* case dealt with a different Kentucky law, with the particular aims of the Kentucky legislature in enacting it, and with an entirely different history of construction and application than Florida's Section 626.988. *Owensboro* was decided by the Sixth Circuit based upon that Court's conclusion that Kentucky law Section 287 was not enacted for the purpose of regulating the business of insurance. The Sixth Circuit did not consider the issue of whether Section 92 of the National Bank Act "specifically relates to the business of insurance" for McCarran-Ferguson purposes. Thus, the Sixth Circuit *Owensboro* decision is plain and simply a decision which turned on the merits of Kentucky law Section 287.

Ascertaining the aim of the Florida Legislature in enacting 626.988 is aided by the considerable amount of scrutiny this law has received over the years. The Court of Appeals began its analysis of the aim of 626.988 with the location of the law in the Florida Insurance Code. Section 626.988 is located in the part of the Florida Insurance Code entitled "Unfair Insurance Trade Practices." As expressed in *Fabe*, location informs (but does not determine) as to whether a statute regulates the business of insurance. The expressed purpose of the statutory provisions within the Unfair Trade Practices Act is found at Section 626.951, Florida Statutes:

The purpose of this part is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress of March 9, 1945 (Pub. L. No. 15, 79th Congress) [the McCarran-Ferguson Act], by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive

acts or practices and by prohibiting the trade practices so defined or determined.

Id. Placing Section 626.988 within the Unfair Trade Practices Act suggests that the Legislature's aim in enacting this provision was to prohibit unfair methods of competition or unfair or deceptive acts or practices relating to the business of insurance.

The next source of information on the Legislature's aim in enacting 626.988 is the preamble (amended out prior to passage) to the bills leading to the enactment of 626.988, extensively referred to in Barnett's brief.²

The preamble cites a series of findings by a federal administrative law judge in a recommended decision for consideration by the Federal Reserve Board regarding bank holding companies' applications to the Federal Reserve Board to engage in insurance agency activities. The actual preamble provisions found at Barnett's Brief Appendix pages 5a-7a are much more instructive than Barnett's paraphrase at page 19 of its Brief. In particular, finding (d) of the administrative law judge cited in the preamble found:

...[w]hile it is difficult to accurately measure the psychology of voluntary tying, nevertheless the weight of evidence realistically evaluated suggests that in times of scarcity of lending funds, the average borrower finds himself in a weakened bargaining position vis-a-vis the lender and the offer of insurance placement is another device along with compensating balances and utilization of other borrowing services with which the borrower can increase the probability that a needed loan will be granted.

Barnett Br. App. 6a-7a.

² The preamble was not introduced into evidence at trial.

The preamble describes the findings as based upon "an exhaustive presentation of evidence." The text of the preamble shows that the preamble drafters were incredulous that despite finding (d), and the other cited findings, the administrative law judge nonetheless recommended that the bank applicants be authorized to engage in insurance agency activities in a limited manner and subject to various restrictions. The preamble drafters then proceeded to express their concerns over insurance agents being employed by, associated, or affiliated with bank holding companies by stating:

WHEREAS, the undue concentration of economic resources, a substantial decrease in competition among insurance agents, unfair competition, conflicts of interest, and voluntary tying are against the public policy of the state and against the best interests of the people of Florida, and

* * *

WHEREAS, to preserve the public policy and protect the public interest insurance agents and solicitors should be prohibited from soliciting, negotiating and selling insurance contracts if employed by, associated or affiliated in any way with specified institutions.

Barnett Br. App. 7a.

It is noteworthy that 626.988 is characterized in the preamble as a prohibition against insurance solicitors and agents soliciting, negotiating, and selling insurance contracts in the employ of or association with financial institutions. This perspective shows the legislative aim was to protect the public interest with regard to an essential element of the insurance transaction — the point of sale by an insurance agent. Thus, the preamble provisions are entirely consistent with the Legislature's placement of 626.988 within the Unfair Trade Practices Act.

Barnett's assertion that the legislature's primary purpose in enacting Section 626.988 was to protect insurance agents is not supported by a fair reading of the preamble or any evidence presented in this case.

Another source of insight regarding the rationale for 626.988 is state litigation involving this law, particularly *Glendale Federal S&L v. Department of Insurance*, 587 So.2d 534 (Fla. 1st DCA 1991), cited by the Court of Appeals below. The Florida trial court's summary judgment order in *Glendale* noted that the parties had developed a factual record through the filing of memoranda and through extensive discovery. Based on the evidence presented, the trial court found:

Concerns regarding financial institutions' entry into insurance activities, including the prevention of coercion, unfair trade practices, and undue concentration of resources, existed at the time of passage of the statute and remain valid today. Expert testimony filed with this Court shows that a legislature could well have decided that some protection was required.

Glendale, 587 So.2d at 536, n.1. (emphasis added).

The language used by the District Court of Appeal reflects the Court's conclusion, based on the evidence presented, that the perceived dangers were real and far from "implausible." The District Court of Appeal, in affirming the trial court, held:

[T]he cited rational bases of prevention of coercion, unfair trade practices and undue concentration of resources, in light of evidence in the form of affidavits and deposition testimony of expert witnesses, support the conclusions that the legislature could properly decide to act as it did, and that the statute accordingly does not violate due process.

587 So.2d at 537.

The District Court below also noted this fact in an earlier decision, *Production Credit Associations of Florida v. Department of Insurance*, 356 So.2d 31 (Fla. 1st DCA 1978). In construing whether certain entities were "financial institutions" under 626.988, the Florida appellate court held:

Insurance is an industry affected with a public interest and subject to regulation by the States. The Legislature has determined that there is a potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest.

Id. at 32. The Florida First District Court of Appeal in *Production Credit* clearly understood the legislative purpose of 626.988 to be protecting the public from abuse.

When the issue of financial institutions engaging in insurance agency activities has been subjected to extensive evidentiary exposition, both in *Glendale* and the administrative hearing cited in the preamble, the finding has been that unfair trade practices, coercion, undue concentration of resources, and conflict of interest may arise from this practice.

In another case involving implementation of 626.988, *Great Northern Insured Annuity Corporation, et. al v. Department of Insurance and Treasurer*, a state of Florida Division of Administrative Hearings Final Order (*Fl. Bankers Assoc.* Br. 1a-37a), independent Hearing Officer Mary Clark found, also after hearing extensive evidence:

As stated in *Glendale*, the legislature was guarding against the dangers of financial institutions becoming involved in the business of insurance: the prevention of coercion, unfair trade practices, and undue concentration of resources.

Fl. Bankers Assoc. Br. p. 22a.

As can be seen, for purposes of determining Legislative intent, Section 626.988 comes before this Court as the most battle-hardened state law in the nation involving the issue of insurance agents associating with financial institutions in the sale of insurance. Each time, however, the ultimate finding has been that 626.988 was enacted to prevent coercion, unfair trade practices, and undue concentration of resources.

Barnett disingenuously argues that Ms. Linda Clifford, as a licensed insurance agent, was as personally qualified to sell insurance after she became a Barnett Bank employee as she had been previously. This argument avoids the real issue. When Barnett purchased Ms. Clifford's insurance agency and she became a Barnett employee, it was the influence exerted on insurance transactions by Barnett and not by Ms. Clifford personally, which gave rise to the Department's Immediate Final Order. The record is clear that the direction and mission of the Linda Clifford Insurance Agency changed dramatically upon purchase by Barnett.

Barnett and its Amici further urge this Court to dismiss as implausible the expressions of legislative purpose of 626.988 made by Florida's Legislature, insurance regulator, and courts. The crux of their argument is that no one could really believe that prohibiting bank holding companies from engaging in insurance agency activities safeguards insurer solvency and protects the public in insurance transactions. Barnett and its Amici base their entire reasoning on the premise that 626.988 is solely an economic conflict between banks and independent insurance agents and is not "truly regulatory". If 626.988 has a greater public protection purpose and is "truly regulatory," Barnett's arguments collapse.

Actual experience in Florida has demonstrated that unfair trade practices do occur when bank holding companies enter into arrangements with insurance agents for the sale of insurance on bank premises.

In the case of *Department of Insurance and Treasurer v. James Mitchell and Company, et al.* (Recommended Order dated August 30, 1994), State of Florida Division of Administrative Hearings Independent Hearing Officer Charles C. Adams³ made the following Finding of Fact at page 6, paragraph 12:

As contemplated by the services agreement the customer base for the James Mitchell insurance agents is primarily constituted of Barnett Bank customers who have been referred by Barnett Bank employees. The insurance agents and other employees who work in Florida do not solicit insurance business unrelated to the tie-in with Barnett Banks, Inc. and its branches.

The Hearing Officer made a Conclusion of Law at page 46, paragraph 121, of his Recommended Order, that the arrangement between James Mitchell and Company and Barnett had the following result:

James Mitchell and Company has violated Section 626.9541(1)(b), Florida Statutes, in the manner alleged. Specifically, James Mitchell and Company has knowingly established its own advertising, and benefited from Barnett advertising pursuant to the services agreement. James Mitchell and Company has made statements about, and benefited from statements by Barnett employees pursuant to the services agreement. The advertising and statements concerned insurance sales through the Tax Advantage Account by Mitchell Tax Advantage Account Specialists (insur-

³ The administrative proceedings in *James Mitchell* (as well as in *Great Northern, supra.*), were pursuant to Florida's Administrative Procedures Act, Chapter 120, Florida Statutes, and as such the hearing officers in both proceedings were independent of, and not chosen by the Department.

ance agents). By these arrangements, James Mitchell and Company has placed before the consuming public information which is deceptive and misleading as to the fact that insurance products are being sold by insurance agents who work for James Mitchell and Company. James Mitchell and Company has committed the violations both by direct and indirect actions. Violations of Section 626.9541(1)(b), Florida Statutes, pertaining to the deceptive and misleading actions by James Mitchell and Company are found in the use of business cards which the James Mitchell and Company insurance agents provide to customers, appointment cards prepared by Barnett employees, and brochures disseminated by Barnett employees and Mitchell employees, which materials contribute to the deceptive and misleading nature of the Mitchell/Barnett program. The office layout in which the James Mitchell and Company insurance agents market the products on the premises of the Barnett branch banks contributes to the deceptive and misleading nature of the program. The personal and telephonic solicitations of customers by James Mitchell and Company insurance agents and through actions of Barnett Bank employees, contemplated by the services agreement, contribute to the deceptive and misleading nature of the program.

The Hearing Officer's findings are exactly what Barnett is asserting is an implausible rationale for 626.988. The Barnett/Mitchell arrangement was a conscious effort to obscure the distinction between Barnett's banking activities and insurance products sold on bank premises. The result was consumers being deceived and misled as to the fact they were buying an insurance company product and not a bank product, and that individuals on Barnett premises who appeared to be bank employees were actually insurance agents. Barnett customers were

being channeled into insurance transactions by Barnett employees without understanding that the insurance product called a "Tax Advantage Account" was not part of Barnett's bank services.

The Department of Insurance in a Final Order issued July 7, 1995, accepted the Hearing Officer's recommended penalties and revoked the Florida nonresident life insurance agent's license issued to James K. Mitchell, ordered James K. Mitchell and Company, and James K. Mitchell, as an officer and director of James K. Mitchell and Company, to cease and desist the prohibited practices described in the Recommended Order, and ordered James K. Mitchell and Company to obtain an insurance agency license. The Department of Insurance additionally concluded in its Final Order that the Mitchell/Barnett arrangement was an illegal association with regard to insurance sales between an insurance agent and bank pursuant to 626.988. The Department's Final Order is currently on appeal before the Florida First District Court of Appeal.⁴

The holding of the District Court below was indeed prophetic with regard to the Hearing Officer's conclusions in the *Mitchell* case eight months later. The District Court held:

Additionally, and notwithstanding the existence of specific prohibitions on coercive credit extension, the Court finds that loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-length

⁴ Eighteen copies of the Hearing Officer's Recommended Order and Department Final Order in *Department of Insurance and Treasurer v. James Mitchell and Company, et al.* have been lodged with the Supreme Court Clerk's Office. These documents are official public records of the State of Florida.

relationship be maintained among the bank, the loan officer and the insurance agents. The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders.

Barnett, 839 F.Supp. at 842, Pet. App. 31a.

The Circuit Court below put an even finer point on this issue by holding:

While Appellant Barnett Marion argues that the statute exists only to protect "independent insurance agents from competition by financial institutions," Appellants Brief at 35, we disagree. The danger in these situations, as the trial court correctly points out, is the loss of arms-length transactions and objectivity when the bank becomes involved with insurer and insured.

Barnett, 43 F.3d at 636, Pet. App. 12a.

D. The Established Purpose Of 626.988 Meets The First Prong Of The *Fabe* Test.

Once the purpose of 626.988, as expressed by Florida's Legislature, state regulator, and courts, is established, the next analysis is how the expressed purpose fits the federal definition of regulating "the business of insurance." In *Fabe*, *supra*, this Court explained the issue by holding:

The broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention or aim" of *adjusting, managing, or controlling* the business of insurance. Black's Law Dictionary 1236, 1286 (6th ed. 1990). This category necessarily encompasses more than just the "business of insurance." For the reasons expressed above, we believe that the actual perform-

ance of an insurance contract is an essential part of the "business of insurance."

113 S.Ct. at 2210 (emphasis added).

The District Court, applying the *Fabe* test, characterized 626.988 as appearing to:

define or regulate a relationship between insurer and *potential* policyholder, that is, the insurance-purchasing public at large, rather than one between insurer and *present* policyholder.

839 F.Supp. at 840., Pet. App. 28a. The distinction between "potential" and "present" policyholders utilized by the District Court is pointed to by Barnett as a flaw in the reasoning of the lower courts. However, Barnett's argument reveals a lack of practical understanding of the business of insurance and its regulation.

The point-of-sale transaction, when the insurance is solicited and sold, is an essential part of the business of insurance. Every person who purchases insurance is a "potential" policyholder until an actual insurance policy is issued. What occurs during the solicitation and sale of the policy — what the consumer represents to the agent and what the agent represents to the consumer — influences the very existence and enforceability of an insurance contract. The consumer is still a "potential" policyholder when solicitation materials are provided, when coverage choices are made, and even when the vitally important application for coverage is filled out. In terms of regulating abuses such as unfair trade practices and coercion, the focus of regulatory efforts is protecting "potential" policyholders. Moreover, "potential" policyholders become "present" policyholders generally with no personal contact with the insurer whatsoever. The insurance agent is the living link between the policyholder and the insurance company. "Insurance is a business greatly affected by the public trust, and the holder of an

agent's license stands in a fiduciary relationship to both the client and insurance company." *Natelson v. Department of Insurance*, 454 So.2d 31, 32 (Fla. 1st DCA 1984). In sum, the relationship between insurer and policyholder revolves around the axis of the role of the insurance agent.

The District Court proceeded to cite the *National Securities* holding that statutes aimed at protecting the relationship between insurer and insured, "directly or indirectly," are statutes enacted for the purpose of regulating the business of insurance. The Court then concluded:

Future policyholders then are "indirectly" affected by regulations such as section 626.988. Thus, the Court finds that Florida section 626.988 indirectly protects the relationship between insurer and insured because it is aimed at protecting the insurance purchasing public at large.

Barnett, 839 F.Supp. at 841.

The Court uses the term "indirect" to connote that laws which regulate the point-of-sale transaction involve persons who are not yet "insureds." In this sense, as already indicated, many important insurance consumer protection laws "indirectly" affect the relationship between insurer and policyholder.⁵ Therefore, the important consideration is not the directness of the protection, but its role in protecting the public. The public can be much better protected by regulating against abuses at the point of sale rather than after "the horse is out of the barn" when a policy has been issued and a "direct" relationship exists.

⁵ E.g., misrepresentations and false advertising, defamation, boycott, coercion, intimidation, false statements, unfair discrimination, unlawful rebate, twisting, misrepresentation in insurance applications, refusal to insure, prohibited arrangements as to funerals and funeral directors, and sliding. Fla. Stat. Ann. §626.9541(1) (a), (b), (c), (d), (g), (h), (k), (l), (s), (x), (z).

The Circuit Court below summarized its reasoning for concluding 626.988 regulates the business of insurance as follows:

Relying on the state court interpretations, testimony at trial, reference in the Florida statute to McCarran-Ferguson, and explicit instruction from the United States Supreme Court in *Nat'l Securities* that regulatory protection of policyholders may be indirect . . . 626.988 regulates the business of insurance because it protects policyholders.

Barnett, 43 F.3d at 636.

This reasoning goes right to the heart of the reality that the purpose of 626.988, which was accepted by both the District Court and Circuit Court, is to protect policyholders. Thus, 626.988 is "truly a form of regulation" of the business of insurance. The regulation takes place at the point of sale and "controls" and "manages" the potential for coercion, unfair trade practices, or undue concentration of resources by removing the potential for abuse perceived by the Legislature.

The Solicitor General's brief supporting *Barnett* makes an important concession at page 12:

We do not dispute that "[t]he selling . . . of policies . . . and the licensing of . . . agents" can be part of the "business of insurance." See *National Securities*, 393 U.S. at 460. Many state sales and licensing regulations may indeed be "enacted . . . for the purpose of regulating" that business within the meaning of 15 U.S.C. 1012(b).

Sol. Gen. Br. p. 12.

However, the Solicitor General still asserts 626.988 is not such a law because an inquiry into the practical, realistic, actual purpose of 626.988 is not "protecting or regulating, even indirectly, the relationship between the insurance company and its policyholders." The Department would respectfully submit that the practical, real-

istic, and actual purpose of 626.988 has been overwhelmingly demonstrated to be the protection of policyholders. It is the Petitioner and its Amici who ask this court to disregard the record and adopt an extremely cynical view of Florida's support of 626.988.

No state or federal court has permitted the established and worthwhile goals underlying 626.988, which operate to protect Florida consumers, to be mischaracterized as merely a conflict between banks and insurance agents. Neither should this Court.

E. The District Court And Circuit Court Recognized The legitimate Peril Of Undue Concentration Of Resources.

One of the stated purposes of 626.988 is the prevention of "undue concentration of resources."⁶ As used in the context of 626.988, the phrase "undue concentration of resources" refers to the situation where a third party marketer provides such a substantial source of income to an insurer that the third party controls, in effect, the decision-making of the insurer. This situation was credibly established by uncontroverted testimony at trial.⁷ This practice thus "indirectly" harms Florida consumers.

⁶ *Glendale*, n. 1.

⁷ Trial transcript page 25, lines 7-19: "Q: You indicated that another purpose of 626.988 is to prevent concentration of economic resources through control of insurance companies by financial institutions. Can you explain how the statute works in that regard? A: Yes. What we have seen is agents and other third parties who have access to a large customer base of potential insurance consumers have the potential through — by virtue of the cash flow and the premium writings that can be generated by that block of business, of controlling the decision making process of the insurers which would provide insurance to that group, to the extent that they have caused the insolvency of insurance companies in Florida and other states."

Trial transcript, pages 25-26: "...once the insurance company becomes dependent on the cash flow the marketers can begin to siphon off funds for

Both the District Court and Circuit Court placed great emphasis on the issue of avoiding threats to insurer solvency in examining Section 626.988. The District Court, in reliance on the testimony of Department witness Shropshire, held:

The Court concurs with the concerns noted by the witness. For example, in order to make a profit on automobile loans or home mortgages, the insurance agents may incur business they might otherwise reject because they would be pressured by the bank to do so in order to consummate the bank's loan transactions. This might lead to the over insurance of risky business, which could result in the insolvency of the insurer.

Barnett, 839 F.Supp. at 842.

The Circuit Court recognized the significance of Mr. Shropshire's testimony, finding:

At trial ... Mr. Shropshire testified about the need to protect policyholders by regulating the financial stability of insurance companies so that they remain solvent and able to pay claims upon demand, which could be threatened by pressures to make improper insurance decisions. This pressure could force an insurer to assume a bad risk to quickly consummate a

administrative expenses or reinsurance agreements with insurers that they are otherwise affiliated with, and...those administrative fees and consulting fees...drive the decisions with respect to the effectuation of coverage."

"If they [the third party marketer] control the insurer they can, therefore, effectuate a situation where they're focused on getting their income from the sale of the insurance that may not always be in the best interest [of the insurer].... They may lower underwriting standards in order to attract more insureds. The long run of that is that it could impact the solvency of the insurance company when those underwriting standards are not enforced and bad risks are put on the book and the insurance company incurred a bunch of claims."

bank loan, or could push a bank customer to take out unnecessary insurance where the bank's only motive is profit.

Barnett, 43 F.3d at 636. This point is so critical that elaboration of this potential for harm is appropriate.

Section 626.988 is only one of several statutory provisions where the Florida legislature has addressed the danger of de facto control of insurers by third parties. As testified at trial,⁸ the Florida legislature has addressed the same danger in several other contexts, including:

- (1) holding companies, Fla. Stat. Ann. § 628.801;
- (2) managing general agents, Fla. Stat. Ann. § 626.7451;
- (3) third party administrators, Fla. Stat. Ann. § 626.88;
- (4) producer-controlled business, Fla. Stat. Ann. § 626.7491;
- (5) favored-agent, Fla. Stat. Ann. § 626.730(3).

The Department presented testimony at trial as to the similarities between the dangers addressed in 626.988 from "undue concentration of resources," and the same type of dangers addressed in other statutes. The motivation to push poor quality business on an insurer is present in each circumstance addressed in the above-cited statutes. Most individual insurance agents are compensated through a system of sales-based commissions, and so some will act upon the same motivation. The difference is that an individual agent, or even an independent

⁸ Trial Transcript, page 27-28. "Q: Okay. Mr. Dowdell, are there other statutes within the [Florida Insurance] Code in addition to 626.988, which were enacted for the purpose of regulating the potential for control of insurers by insurance marketers? A: Yes. There are a number of statutes which have been enacted for that purpose. There is a producer controlled insurer statute...a managing general agent law...a holding company statute...a third party administrator statute...."

small town bank, does not have sufficient leverage to compel insurer management to do something management knows would be adverse to the insurer's solvency. This is not true when an insurer becomes so dependent on a large bank holding company for its dominant income production that the insurance company management cannot afford to make objective decisions. An insurer's management decisions could certainly be adversely influenced by Barnett, with its 600 Florida branches (Lodging, Tab C. p. 9) and enormous potential income stream.

Other commentators have recognized the very real danger to insurer solvency that results when third parties obtain de facto control of an insurer's decision making⁹ with the attendant inability of the insurer to pay claims of policyholders.

Moreover, a Report of the U.S. House of Representatives closely echoes the testimony of the Department's witnesses below, and reveals that the Florida Legislature's concerns, are neither illusory nor hypothetical. This Congressional report is entitled *Failed Promises — Insurance Company Insolvencies — A Report by the Subcommittee on Oversight and Investigations of the Committee On Energy and Commerce, U.S. House of Representatives, 101st Cong., 2d Sess. (1990)*. (The Subcommittee was chaired by Rep. John Dingell, and the February 1990 Report is sometimes referred to as the "Dingell Report.") The first two of a list of six "key weaknesses in the present system

⁹ The insolvency of the Baldwin-United insurance company, one of the largest insurer insolvencies ever to occur in the United States, is attributed by commentators to outside control of the insurer by affiliated parties that did not have the insurer's best interest at heart. See, e.g., Dunne, *Intercompany Transactions Within Insurance Holding Companies*, 20 The ABA Forum 445, 446 (1985): "The bottom line question for insurance regulators is: Can our present laws assure the preservation of the money people have entrusted to insurers that operate within holding company systems to cover risks they are committed to insure? In other words, can the laws keep insurers from getting milked to impotence..."

of solvency regulation,"¹⁰ identified in the Subcommittee Report, directly address the danger of outside influence and control of an insurer by third parties. The Report notes that "through excessive reliance on the judgements of managing general agents, brokers, and other companies, many insurance company managers essentially delegate their most fundamental responsibilities to third parties who may have conflicting interests or inadequate abilities."¹¹ The Subcommittee termed the problems posed by managing general agents, as third parties who can come to control an insurer, as "exceedingly dangerous."¹² Managing general agents are, in essence, "super agents" who control the marketing efforts of an insurer. This arrangement is very similar to the sort of arrangements likely to occur between bank holding companies and insurers. Moreover, contrary to Barnett's assertion, financial institutions could exert undue influence on insurance company decisions without necessarily meeting the definition of a Managing General Agent or other licensed marketer and thus a specific prohibition is required.

While failing to acknowledge that Section 626.988 addresses the same concern, Barnett, at footnote 2, page 28 of its brief, concedes Florida laws regarding third party administrators and managing general agents protect the solvency of insurers stating:

There is no dispute that these laws of general application were intended to protect the solvency of insurance companies by limiting the opportunity for powerful third parties to influence underwriting decisions.

¹⁰ Subcommittee Report, page 3.

¹¹ Subcommittee Report at 3.

¹² Subcommittee Report at 10.

Although more precise in its focus, Section 626.988 deals with a far more powerful third party than managing general agents or third party administrators, and the potential for influencing underwriting decisions is correspondingly greater.

II. The Federal Reserve Act, Including Section 92, Specifically Relates To The Business Of Banking.

Barnett argues in its brief at page 41 that even if Section 626.988 clears the first hurdle of the McCarran-Ferguson test and regulates the business of insurance, this Florida law must clear a second hurdle, that Section 92 does not specifically relate to the business of insurance. Barnett describes this second hurdle as "virtually insurmountable." Barnett's argument makes a subtle, but inappropriate modification of the actual McCarran-Ferguson test.

When McCarran-Ferguson is properly applied, and Section 626.988 clears the hurdle of the first part of the McCarran-Ferguson test, it is Section 92 which then must be tested and clear the hurdle of "specifically relating to the business of insurance." Barnett's argument seeks to obscure the fact that there has been a shifting of the burden of preemption (the concept of reverse-preemption). Barnett must now prove that Section 92 passes muster as a federal law which overcomes the state insurance regulatory law. By suggesting the Florida law must clear both the McCarran-Ferguson test hurdles, Barnett manufactures the argument that:

[I]f a prohibition on banks selling insurance regulates the "business of insurance," section 92's express authorization of bank insurance sales must at least specifically relate to the insurance business.

Barnett Br. p. 41. This argument is flawed because it attempts to answer the second test simply by looking at the answer to the first test. Contrary to this flawed logic, this Court must scrutinize Section 92 on its own merits to determine whether Section 92 was enacted to "specifically relate to the business of insurance." This

analysis is independent of that applied in the first test to the state law.

A. The Second Part Of The McCarran-Ferguson Test Must Be Applied In A Manner Which Gives Substance To McCarran-Ferguson's Protection Of Regulation Of The Business Of Insurance By The States.

In determining whether Section 92 "specifically relates" to the business of insurance, the weight given to the preemptive effect of McCarran-Ferguson has great bearing on the outcome reached. The reasoning of the District Court and Circuit Court below, and of the *Owensboro* courts, reflects a strong recognition of the reverse-preemptive power of McCarran-Ferguson. This perspective was well expressed by the Circuit Court below as follows:

With McCarran-Ferguson guiding our analysis, this Court must ask whether Fla.Stat. ch. 626.988 *regulates* insurance, so as to presumptively preempt contrary federal law. Second, we must ask whether section 92 *specifically relates* to insurance, so that it will fit within the McCarran-Ferguson exception that reinstates federal law as supreme.

Barnett, 43 F.3d at 634.

The McCarran-Ferguson tests thus proceed as follows: A state law which passes the first test preempts the federal law. The federal law can only be "reinstated" by passing the second test.

The cases considering whether Section 92 "specifically relates" to the business of insurance have two common points in their reasoning. First, under McCarran-Ferguson, a federal enactment "specifically relates" only to its primary subject. A provision cannot specifically relate to two things at once. That is, is the primary subject of Section 92 banking or the business

of insurance? Second, the Courts analyze whether the federal law "specifically relates" to the business of insurance with enough substance to reinstate the federal law over the state law. In other words, the federal law must "specifically relate" with enough preemptive horsepower to displace the state law. This perspective is expressed in the District Court's reasoning that:

... section 92 simply fails to manifest any express intent to preempt state insurance laws. That silence is particularly understandable given the historical *fact* that section 92 was enacted "at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause."

Barnett, 839 F.Supp. at 843.

The perspective and reasoning of the lower courts in applying McCarran-Ferguson give substance to Congress' intent for regulation of the business of insurance to lie primarily with the states. Through the "clear statement rule," state laws enjoy the protection necessary to maintain the integrity of the state insurance regulatory system.

However, *Barnett* and its *Amici* approach the issue from an entirely different perspective. They view McCarran-Ferguson as a mere "bump in the road" of federal law supremacy, with any connection to the business of insurance being sufficient to move the federal law past the McCarran-Ferguson obstacle. For example, the Solicitor General, at page 20 of its brief concedes:

We may certainly assume that in authorizing national banks in small towns to sell insurance, Congress' primary purpose was to regulate banking.

Yet, the Solicitor General proceeds to assert Section 92 "specifically relates to the business of insurance by permitting some banks to engage in one aspect of that business." (Solicitor General's Br. at 21.) This reasoning is understandable from individuals accustomed to the supremacy of federal laws under the National Banking Act.

However, any attempt to preempt state regulation of insurance requires a different preemption analysis under McCarran-Ferguson.

B. The Courts Which Have Addressed The Issue Agree: section 92 Is Not An "Act Specifically Relate[d] To The Business Of Insurance."

In determining whether Section 92 "specifically relates to the business of insurance," it is very instructive how the District and Circuit Courts below and the *Owensboro* courts have addressed the issue.

1. The Owensboro District Court

The *Owensboro* District Court conducted its McCarran-Ferguson analysis "in reverse order" and determined first whether 12 U.S.C. § 92 is an Act of Congress which relates to the business of insurance. The Court concluded:

The "business of insurance" has been narrowly defined, and it seems fairly obvious that § 92 does not constitute Congressional regulation of that business. This section is a part of the National Bank Act, and its function is to grant additional powers to national banks. That the power granted to the national banks involves insurance does not transform this section into a regulation of the business of insurance. Accordingly, § 92 will not invalidate the Kentucky statute on these grounds.

Owensboro Nat'l Bank v. Moore, 803 F.Supp. 24, 36 (E.D.Ky. 1992). The *Owensboro* District Court looked at the *function* of Section 92 — to grant additional powers to national banks — and properly concluded that the fact that this grant of power involved insurance did not transform Section 92 into regulation of the business of insurance.

2. The Owensboro Circuit Court

On appeal, the *Owensboro* Circuit Court majority stated, "we need not consider whether Section 92 'specifically relates to the business of insurance'; for without regard to whether Section 92 so relates, McCarran-Ferguson cannot save Section '287 from preemption." *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994). Thus, the *Owensboro* majority took no position on whether Section 92 "specifically relates to the business of insurance."

Judge Batchelder, in a dissenting opinion (Pet. App. 50a-64a), did address whether Section 92 specifically relates to the business of insurance. Her position squared with the *Owensboro* District Court that Section 92 is not an Act specifically related to the business of insurance. (Pet. App. 61a *et seq.*) Citing Section 92's legislative history, she found the District Court's *Owensboro* analysis "sound" because the primary intent of Section 92 was to strengthen small national banks by providing them with additional sources of revenue *Owensboro*, 44 F.3d at 397-398.

3. The Barnett District Court

The District Court addressed the issue of Section 92 "specifically relat[ing] to the business of insurance" at footnote 3 of its opinion:

In the alternative, Plaintiff [Barnett] could prevail under a McCarran-Ferguson analysis if the Court found that section 92 was specifically related to the business of insurance, and if 626.988 is deemed to be a law enacted for the purpose of regulating insurance. However, Plaintiff has consistently stated and/or conceded that section 92 is a "bank" law, and has premised its argument accordingly.

Barnett, 839 F.Supp. at 839, Pet. App. 25a. The Court's observation that *Barnett* had stated and/or conceded Section 92 is a "bank" law is supported by the following trial excerpt:

The Court: And your belief is that Section 92 is a banking statute?

Mr. Wells: I believe that Section 92 is in the National Bank Act and provides that a national bank can engage in certain insurance agency activities.

The Court: So would you classify it as a banking statute or an insurance statute or a combination thereof?

Mr. Wells: I would classify it as a banking statute.

TR-108. *Barnett* made the same concession in its pleadings, stating:

This issue was also squarely addressed in *Owensboro*. There, the court recognized that a national bank engaged in insurance agency activities pursuant to Section 92 is not engaged in the business of insurance, it is engaged in the business of banking: "that the power granted to the national banks involves insurance does not transform this section [92] into a regulation of the business of insurance." *Owensboro*, 803 F.Supp. at 36.

R. 2-28, p.21.

4. The *Barnett* Circuit Court

The Circuit Court below began its analysis of this issue by tracing the history of Section 92, which it took in "compacted form" from *United States Nat'l Bank of Or. v. Independent Ins. Agents*, ___ U.S. ___, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). *Barnett*, 43 F.3d at 637, n. 2; (Pet. App. 13a-14a). The Circuit Court, relying on this Court's decision in *Fabe*, stated:

Although *Nat'l Bank of Or.* did not address whether section 92 relates to insurance, it did emphasize at length the relation between section 92 and both the National Bank Act and the Federal Reserve Act, neither of which suggests section 92 relates specifically to insurance or was a specific attempt to preempt state insurance laws. Both Acts concern banking, not insurance. Moreover, Congress enacted section 92 "at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause." *Fabe*, ___ U.S. at ___, 113 S.Ct. at 2212. As the trial court pointed out, "[e]ven *South-Eastern Underwriters*, which briefly altered the preemption landscape, noted that prior to 1944 Congress 'at no time' had attempted to control the business of insurance." [citations omitted] Before 1944, both Congress and the Supreme Court understood *Paul v. Virginia* [citation omitted] to place insurance outside the Commerce Clause power. Accordingly, when Congress enacted section 92 in 1916 — nearly 30 years before *South-Eastern Underwriters* — Congress could not have been attempting to regulate a business that it believed it had no power to regulate. Congress was concerned with banking, not insurance.

This Court concludes that section 92 neither "specifically relates to the business of insurance," 15 U.S.C. § 1012(b), nor "specifically requires," *Fabe*, ___ U.S. at ___, 113 S.Ct. at 2211, that apparently conflicting state laws be preempted.

Barnett, 43 F.3d at 637.

The pertinent decisions reveal that there is no conflict among the federal circuits on the issue of whether Section 92 "specifically relates to the business of insurance." To the contrary, each Court which has considered the question has dis-

posed of this issue in the negative with relative ease. (See also Louisiana state court decision: *First Advantage Ins., Inc. v. Green*, 652 So.2d 562 (La. Ct. App.), writ. denied, 654 So.2d 331 (La. 1995).)

C. The Court Should Examine The 1916 Act As A Whole To Determine Whether Section 92 Specifically Relates To The Business Of Insurance.

The McCarran-Ferguson Act provides that no "Act" of Congress shall impair state law enacted for the purpose of regulating the business of insurance unless the Act specifically relates to the business of insurance. Therefore, in determining whether the exception to McCarran's reverse preemption applies to Section 92, examination of the 1916 Act as a whole is instructive. (See Judge Schlesinger's remarks at Transcript of Motions Hearing, 41-42.)

Section 92 was enacted in 1916 as a part of a comprehensive amendment of the Federal Reserve Act of 1913.¹³ The 1916 legislation is entitled "An Act to Amend Certain Sections of the Act Entitled 'Federal Reserve Act.'" The 1916 Act (Lodging, Tab A) amended numerous sections of the 1913 Federal Reserve Act in a variety of ways distinctively relating to banking, including: permitting member banks to maintain reserves in their own vaults; increasing the amounts of certain instruments a bank could receive if secured by collateral; permitting any Federal reserve bank to make advances to member banks for a period not exceeding fifteen days; permitting member banks to accept certain instruments for the purpose of furnishing dollar exchange; authorizing member banks to open and maintain bank accounts for foreign correspondents; permitting banks to make loans secured by farm land and real estate situated within 100

¹³ A copy of the 1916 Amendment to the 1913 Federal Reserve Act is included in the Department's Lodging with the Supreme Court Clerk.

miles of the bank's location; and authorizing national banking associations with capital and surplus of \$1 million or more to invest in the stock of banks engaged in international and foreign banking. One provision of the 1916 Act, now codified as 12 U.S.C. 92, permitted national banks located in a place of 5,000 or less population to act as insurance agents.

However, Section 92 is not an "Act." It constitutes only a small part of chapter 461, "An Act To amend certain sections of the Act entitled 'Federal reserve Act,'" H.R. 13391, 64th Cong., 1st Sess. Ch. 461 (1916). The 1916 amendment to the Federal Reserve Act, taken in its entirety, cannot be said to "specifically relate" to the business of insurance. As noted by this Court in *U.S. Nat'l Bank of Or.*, "Section 92 travels together with the paragraphs that surround it." 113 S.Ct. at 2185.

D. Section 92 Does Not Meet The McCarran-Ferguson "Clear Statement Rule".

Even assuming arguendo that Section 92 is an "Act," Section 92 still does not "specifically relate" to the business of insurance within McCarran-Ferguson's "clear statement rule," as described in *Fabe, supra*, as follows:

The McCarran-Ferguson Act did not simply overrule *South-Eastern Underwriters* and restore the status quo. To the contrary, it transformed the legal landscape by overturning the normal rules of pre-emption. Ordinarily, a federal law supersedes any inconsistent state law. *The first clause of § 2(b) reverses this by imposing what is, in effect, a clear-statement rule, a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.*

113 S.Ct. at 2211 (emphasis added).

The "clear statement rule" arises in part as a result of the strong presumption against imputing to Congress an intent to preempt state regulation in an area which has been traditionally left to the states. *Jones v. Rath Packing Co.*, *supra*, 430 U.S. at 525. The *Fabe* Court's recognition of this rule also arises from the legislative history statements "animating" the first clause of 15 U.S.C. § 1012(b):

Elaborating upon the purpose animating the first clause of § 2(b) of the McCarran-Ferguson Act, Senator Ferguson observed:

"What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law *relating to* interstate commerce, or *if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance*. We wanted to be sure that the Congress, in its wisdom, would *act specifically with reference to insurance* in enacting the law." 91 Cong Rec 1487 (1945). This passage later confirms that "*no existing law and no future law should, by mere implication, be applied to the business of insurance*" (statement of Mr. Mahoney). *Ibid.*

Fabe, 113 S.Ct. at 2211, n. 7 (emphasis added).

These excerpts from the legislative history of the McCarran-Ferguson Act reflect that Congress intended to avoid any inadvertent preemption of state insurance law by federal law. It is not enough for a federal act to involve the business of insurance. Something more was envisioned. In the words of Senator Ferguson, Congress must act "specifically" with reference to insurance.

When used as an adjective, "specific" is defined as "constituting or falling into a specified category" or "restricted by

nature to a particular individual, situation, relation, or effect." *Webster's New Collegiate Dictionary* (1981). A given law cannot "specifically relate" to two different subjects. Section 92 is but one of a variety of provisions contained in the 1916 Act amending the Federal Reserve Act which confers additional authority to national banks. Section 92 only relates to the business of banking, not the business of insurance.

When used as a noun, "specific" means "details" or "particulars." *Id.* In this context, Section 92 must therefore deal with the business of insurance in a detailed manner in order to qualify as an exception under the McCarran-Ferguson Act. The 1916 Act contains a variety of detailed provisions relating to the intricacies of numerous banking activities. Section 92, by contrast, does not describe insurance-related activities in any detail whatsoever. The fact that the word "insurance" is mentioned several times in Section 92 does not transform the statute into an act which specifically relates to the business of insurance.

Further, in addition to authorizing insurance sales, Section 92 also authorizes a national bank to act as a broker for real estate loans and to receive fees and commissions in that regard. The common element of the two activities is the receipt of commissions. Section 92 therefore specifically relates to bank income, not the business of insurance.

The version of the McCarran-Ferguson Act which was passed by both the House of Representatives and the Senate read:

No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such act specifically so provides.*

91 Cong. Rec. 329-30 (1945), 91 Cong. Rec. 478-88 (1945) (emphasis added).

The McCarran-Ferguson Act was amended in Conference Committee to exempt a Federal act which "specifically relates to the business of insurance." Barnett asserts that the Conference Committee "jettisoned the narrow savings clause in favor of an expansive clause that validates any federal statute that 'specifically relates to the business of insurance.'" However, the Conference Committee Report (Lodging, Tab B) states it was the purpose of the agreement between the House and Senate to state in as clear language as possible that a moratorium be granted to the insurance business from the operation of antitrust laws, "leaving the taxing and regulatory powers of the several States fully protected."¹⁴ This statement makes it clear the language change was not intended to dilute protection of state regulation.

E. In Enacting Section 92, Congress Never Intended To Permit The Comptroller To Unilaterally Supplant Established State Insurance Regulatory Schemes.

There can be little doubt that in 1916, Congress had no intention of placing the Comptroller of the Currency in the position of regulating the business of insurance. Any authority granted to the Comptroller is based on the Comptroller's authority over the business of banking, not the business of insurance. Regulation of the business of insurance is entirely outside the Comptroller's area of jurisdiction and expertise. To conclude that Section 92 specifically relates to the business of insurance would produce the absurd result of the Comptroller of the Currency regulating the business of insurance.

Congress' purpose in enacting Section 92 was to allow a limited group of small national banks to pursue another revenue source. Prior to Section 92's enactment, national banks had no

¹⁴ A copy of the Conference Committee Report is included in the Department's Lodging with the Supreme Court Clerk.

authority to sell insurance *even in the absence of state law prohibiting such sales*. Thus, Section 92 has been properly construed to merely permit (as opposed to mandate) national banks to sell insurance in towns of under 5,000 population, only if a state law does not prohibit such activity. However, in Florida, state law does prohibit such activity for valid reasons unique to Florida. There is no indication whatsoever that Section 92 was intended to remove any power held by the states.

F. Cases Cited By Barnett Construing "Specifically Relates To Insurance" Are Distinguishable.

Barnett's position is not strengthened by reference to cases involving the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1001, *et seq.* ERISA comprehensively regulates insured and self-insured health and life insurance plans offered by employers to employees. "ERISA, both in general and in the guaranteed benefit policy provision in particular, obviously and specifically relates to the business of insurance." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, ___ U.S. ___, 114 S.Ct. 517, 525, 126 L.Ed.2d 524 (1993). In contrast, Section 92 does not comprehensively regulate the business of insurance.

Further, ERISA's "deemer" clause clearly evidences an intent to exempt employee benefit plans from the preemption language of McCarran-Ferguson. In this regard, 29 U.S.C. 1144(b)(2)(B) expressly provides that no employee benefit plan "shall be deemed to be an insurance company . . . or to be engaged in the business of insurance . . . for purposes of any law of any state purporting to regulate insurance companies." Whereas several courts have found ERISA to specifically relate to insurance, none have found Section 92 to relate to anything other than banking.

The decisions in *Hanover Ins. Co. v. Commissioner*, 598 F.2d 1211 (1st Cir.), *cert. denied*, 444 U.S. 915 (1979), and *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir.

1987), *cert. denied*, 490 U.S. 1035 (1989), relied on by Barnett, are likewise not persuasive. The *Hanover* Court reviewed an Internal Revenue Service statute dealing exclusively with the taxation of insurance companies. The federal statute (26 U.S.C. § 832) allowed an insurer to deduct incurred but unpaid losses from taxable income but required the estimate of such losses to be reasonable. The Court concluded there was no demonstration that the Code provision in any way impaired state insurance regulation indicating:

“Because the power of the federal government to tax was not delegated to the states” by the Act ... [citation omitted] the application of federal laws to insurance companies is not inconsistent with the intent of Congress to refrain from interfering with state regulation of the insurance business.

Hanover, 598 F.2d at 1218. Further, unlike Section 92, the Internal Revenue Code provision considered in that case is part of a pervasive regulatory scheme in which Congress has indicated an intent to occupy the field. (Sections 801 to 843 of Subchapter L of Chapter 1 of the Internal Revenue Code)

Similarly, the *Texas Employers’* Court addressed the Longshore and Harbor Workers Compensation Act. 33 U.S.C. § 901, *et seq.* Unlike Section 92, the Federal worker’s compensation act expressly provides that an employer’s liability under the Act is “exclusive and in place of all other liability.” 33 U.S.C. § 905. Further, the Act is a comprehensive scheme addressing worker’s compensation benefits provided by employers through insured and self-insured programs. Section 935 of the Act subjects insurers to all of the requirements and obligations applicable to employers, and expressly indicates that such a requirement facilitated the administration of the entire regulatory scheme. Again, unlike Section 92, the intent of the Act to preempt may be inferred from the creation of a pervasive federal regulatory system.

Finally, *Wisner v. Wisner*, 338 U.S. 655 (1950), cited by Barnett, is irrelevant. The case dealt with a conflict between the National Service Life Insurance Company Act of 1940 and a state’s community property law. No state law enacted for the purpose of regulating the business of insurance was involved and the case has no bearing on the interpretation of the McCarran-Ferguson Act.

III. Under Traditional Preemption Doctrine, Petitioner Cannot Overcome The Strong Presumption That Congress Did Not Intend To Oust State Regulation Of The Conduct Of Insurance By Preempting Section 626.988.

The Eleventh Circuit did not reach the question whether Section 92 preempts Section 626.988 under a traditional preemption analysis because it concluded that the McCarran-Ferguson Act’s “reverse-preemption” rule precludes an interpretation of Section 92 as superseding state law. Nevertheless, even under traditional preemption doctrine, Section 626.988 is fully applicable to Barnett, regardless of its national bank charter.

Petitioner cannot overcome the strong presumption that Congress did not intend to displace the States’ traditional role in regulating the conduct of insurance within their borders. See *N.Y. Conf. of Blue Cross v. Travelers Ins.*, __ U.S. __, 115 S.Ct. 1671, 1676 (1995). There is no “clear and manifest” evidence, *id.*, that Congress intended to convey an indefeasible right on small-town national banks to sell insurance even where state insurance law would limit or preclude that activity, especially where, as here, the state law is evenly applied to both state-chartered and federally chartered banks. Section 92’s legislative history demonstrates that it was designed to enable small-town national banks to obtain additional fee income in order to better compete with state-chartered banks that were permitted to engage in these nonbanking activities. See 53 Cong. Rec. 11001 (1916); Barnett Br. at 3. There is no evidence Congress believed that this authority was critical to the banking functions of

national banks, and there is no evidence that it serves such a purpose. In enacting Section 92, Congress did no more than grant small-town national banks the charter capacity to engage in a business that was universally understood to be controlled exclusively by the states. Section 626.988, which has the effect of precluding *all* bank subsidiaries of bank holding companies from selling non-credit insurance, does not create an "obstacle" to the accomplishment of Congress' goals. *See Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1975).

To avoid repetition and preserve space, the Department will not reiterate the traditional preemption arguments more fully set out in the Brief of the Florida Association of Life Underwriters, et al., and fully adopts those arguments.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

DAVID J. BUSCH
Counsel of Record

DANIEL Y. SUMNER
General Counsel
DENNIS SILVERMAN
KAREN ASHER-COHEN
FLORIDA DEPARTMENT
OF INSURANCE
200 E. Gaines Street
Tallahassee, FL 32399-0333
(904) 413-4146

Attorneys for Respondents
Bill Nelson and the Florida
Department of Insurance

December 8, 1995.

19
No. 94-1837

Supreme Court, U.S.

FILED

DEC 8 1995

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,
v.

**BILL NELSON, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, et al.,**
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

**BRIEF OF RESPONDENTS
FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
PROFESSIONAL INSURANCE AGENTS
OF FLORIDA, INC., and
FLORIDA ASSOCIATION OF INSURANCE AGENTS**

ANN M. KAPPLER *
SCOTT A. SINDER
SAM HIRSCH
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000

Of Counsel:

BRUCE J. ENNIE, JR.
PAUL M. SMITH
DONALD B. VERRILLI, JR.
JENNER & BLOCK

** Counsel of Record for
Respondents*

WILSON - BROS PRINTING CO., INC. - 703-6096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether Petitioner has produced an unambiguous showing that, in enacting 12 U.S.C. § 92 with the goal of permitting small-town national banks to compete with state-chartered banks that could sell insurance, Congress expressed its "clear and manifest intent" to preempt traditional state law controlling the identities and activities of those licensed to sell insurance in the State?

2. Whether a state law that protects policyholders by prohibiting licensed agents from affiliating with certain financial institutions was "enacted for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)?

3. Whether a provision of federal law buried in the Federal Reserve Act that grants some national banks charter authority to sell insurance, but expresses no intent to intrude upon traditional state insurance regulation, "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1837

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,
v.
BILL NELSON, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF RESPONDENTS
FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
PROFESSIONAL INSURANCE AGENTS
OF FLORIDA, INC., and
FLORIDA ASSOCIATION OF INSURANCE AGENTS

STATEMENT

This case involves the authority of the Florida Department of Insurance (the "Department") to exercise its traditional police power to regulate the sale of insurance within the State's borders. Like every other State, Florida requires any agent who solicits or sells insurance to be licensed by the State. In order to prevent coercion of insurance purchasers, undue concentration of resources, and unfair competition, the Florida Legislature has determined that licensed insurance agents should not be employed by certain financial institutions, including both

state-chartered and federally chartered bank affiliates of holding companies. There is no question Florida can bar state-chartered banks from selling insurance. Petitioner argues, however, that Congress intended for national banks to have greater rights than state banks, and that federal law precludes state regulation of the insurance agency activities of national banks and their employees.

The Eleventh Circuit held that the Florida insurance regulation is not preempted by federal law that simply gives small-town national banks the corporate power to sell insurance, 12 U.S.C. § 92 ("Section 92"). That ruling is correct for two independent reasons. First, under traditional preemption doctrine, the federal authorization does not preempt Florida's evenhanded prohibition. Second, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, precludes an interpretation of Section 92 that would supersede Florida's insurance regulation.

A. Regulation of Insurance.

"Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business.—Insurance touches the home, the family, and the occupation or the business of almost every person in the United States." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 (1944). "It is practically a necessity to business activity and enterprise." *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 414 (1914). In addition to protecting a large part of the country's wealth, insurance is the essential means by which the "disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired." *Id.* at 412. Thus, it is "the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation." *Id.*

1. Historically, States Exclusively Regulated Insurance.

To meet the "imperative need" for regulation, State Legislatures have enacted comprehensive bodies of law, dating back over one hundred years, to "control the insurance business." *South-Eastern Underwriters*, 322 U.S. at 544-45. State insurance law regulates every aspect of the business, such as: insurance companies (including assets, liabilities, and investments), insurance policies and rates, and those who solicit the purchase of and sell insurance on behalf of companies—e.g., their agents. See generally Edwin Patterson, *The Insurance Commissioner in the United States* (1927).

Until 1944, it was universally understood that the States maintained exclusive control over the regulation of insurance. E.g., *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2207 (1993); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538-39 (1978). This axiom of state regulation had existed at least since 1869, when the Supreme Court decided *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), which involved an appeal by an insurance agent from a fine imposed for selling coverage for a New York insurer that was not properly licensed in Virginia. In rejecting the agent's argument that the Virginia licensing laws violated the Commerce Clause of the U.S. Constitution, the Court held that "[i]ssuing a policy of insurance is not a transaction of commerce" and is "governed by the local law." *Id.* at 183. Subsequent cases held that the entire business of insurance was *not* interstate commerce regulable by Congress. Like *Paul v. Virginia* itself, many of these cases involved state statutes governing licensure of insurance companies and their agents.¹

¹ E.g., *Hooper v. California*, 155 U.S. 648, 649 (1895); *Noble v. Mitchell*, 164 U.S. 367, 368-69 (1896); *Nutting v. Massachusetts*, 183 U.S. 553, 556 (1902); *Northwestern Mut. Life Ins. Co. v. Wisconsin*, 247 U.S. 132 (1918); *Bothwell v. Buckbee-Mears Co.*, 275 U.S. 274, 275-76 (1927).

Consistent with this caselaw and understanding, Congress routinely refused to extend federal authority over the conduct of the private-sector insurance business. Between 1902 and 1906, for example, numerous bills were introduced providing for federal regulation of various aspects of the insurance industry, but the judiciary committees of both the House and Senate concluded such regulation was beyond Congress' constitutional power. S. Rep. No. 4406, 59th Cong., 1st Sess. (1906); H.R. Rep. No. 2491, 59th Cong., 1st Sess. 12-25 (1906). In 1914, in recognition of Congress' lack of authority, resolutions were introduced in both the House and Senate proposing that the Constitution be amended to give Congress the power to regulate the insurance industry. S.J. Res. 103, 63d Cong., 2d Sess.; H.R.J. Res. 194, 63d Cong., 2d Sess.

Thus, as of 1916, when the federal law at issue was enacted, Congress did not believe it could constitutionally regulate the general conduct of the private-sector insurance business in this country. Consequently, "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co.*, 438 U.S. at 539.

2. Congress Affirmatively Declares a Policy of Not Regulating Insurance.

All this changed in 1944 with the Court's decision in *South-Eastern Underwriters*, which held that insurance companies are engaged in interstate commerce and are therefore subject to the federal antitrust laws. The decision, "naturally, was widely perceived as a threat to state power to tax and regulate the insurance industry." *Fabe*, 113 S. Ct. at 2207. Congress quickly enacted the McCarran-Ferguson Act. See *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 299 (1960). Passed at the urging of the state insurance regulators directly affected by *South-Eastern*, McCarran "provides that regulation of the insurance industry is generally a matter for the States."

Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2900 (1993).

In McCarran, Congress "not only has eschewed regulation; it has affirmatively declared a policy of not regulating the business of insurance."² The first section of the statute makes Congress' intention clear:

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011. The statute then sets out a rule confirming that, in general, federal law does *not* preempt state laws regulating the insurance industry, and a more specific rule governing the interaction of federal antitrust laws and state insurance regulation. Section 2 of the Act provides:

(a) The business of insurance, and every person engaged therein,³ shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act . . . known as the Sherman Act, and the Act . . . known as the Clayton Act, and the Act . . . known as the Federal Trade Commission

² Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role of Insurance Regulation*, 68 N.Y.U. L. Rev. 13, 14 (1993).

³ Petitioner conveniently excludes this important clause from its quotation of the statute. Petr. Br. at 7.

Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Id. at § 1012 (emphasis added). As this Court has noted, "[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946) (emphasis added).

3. Florida Insurance Regulation.

Florida certifies, supervises, and otherwise regulates insurance companies and their agents. Only licensed insurance agents may solicit or sell insurance in the State, or receive insurance premiums on behalf of an insurer. Insurance companies are *not* authorized to use intermediaries to do business in Florida unless the agents are licensed. See Fla. Stat. §§ 624.425, 624.428, 626.041, 626.051, 626.062.

The provision at issue, Section 626.988, is contained in the Unfair Insurance Trade Practices Act ("Part X"), located within the Florida Insurance Code. Part X was enacted as an express exercise of authority under McCarran. As stated in § 626.951:

The purpose of this part is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in [McCarran], by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. (Emphasis added.)

Section 626.988(2) prohibits licensed insurance agents who are associated with, or employed or controlled by "financial institutions" from engaging in "insurance agency activities." Those activities are defined to exclude solicitation and sale of credit life insurance and credit dis-

ability insurance. § 626.988(1)(b). "Financial institution" is defined to include any type of bank or bank holding company, S&L or S&L holding company, or any subsidiary or affiliate thereof, but to exclude any bank—state or federally chartered—"which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census." § 626.988(1)(a). Pet. Br. App. 3a-4a.

The legislative history of § 626.988 and state caselaw definitively construing the statute demonstrate that it was enacted to protect existing and future Florida insurance policyholders by preventing coercion in bank sales of insurance, undue concentration of economic resources in banks, and unfair trade practices by banks in the sale of insurance.

B. National Banks.

The national banking system grew out of the particular needs and nationalist fervor of the Civil War. At that time, there was no federal control of the monetary system. Coins supplied by the federal government were far surpassed in volume and aggregate value by circulating notes of state banks, whose value was not determined by Congress and varied widely.⁴ In 1863, Congress responded by enacting the National Bank Act (the "NBA"), which created federally chartered banks empowered to issue and accept a uniform national currency.

National banks possess only those powers conferred by federal law. See *Logan County Nat'l Bank v. Townsend*, 139 U.S. 67, 73 (1891). But "regulation of [national] banking has been one of dual control since the passage of the first National Bank Act in 1863." *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980). As this Court explained in *McClellan v. Chipman*, 164 U.S. 347 (1896), "[n]ational banks . . . are governed in their

⁴ Bray Hammond, *Banks and Politics in America* 723 (1957).

daily course of business far more by the laws of the State than of the nation." *Id.* at 356-57 (internal quotation omitted).

Federally regulated banking institutions are generally prohibited from engaging in non-banking activities, including the business of insurance. Section 24 of the NBA, 12 U.S.C. § 24, which sets forth the banking powers of national banks, has consistently been interpreted as strictly limiting their permissible insurance agency activities. *See, e.g., American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993); *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1016 (5th Cir. 1968).

In 1916, then-Comptroller of the Currency John Skelton Williams urged Congress to enact a narrow exception to this general prohibition to provide a modicum of financial assistance to national banks located in small "country communities." Letter from Williams to Sen. Owen, *reprinted in* 53 Cong. Rec. 11001 (1916). In the Comptroller's judgment, empowering these "small national banks" to sell insurance would enable them to "better compete" with those state-chartered banks that were permitted to sell insurance. *Id.* Comptroller Williams noted that under the NBA, national banks were not then empowered to sell insurance, *id.*, even if state law would permit them to do so.

Comptroller Williams drafted proposed legislation authorizing national banks located in towns of not over 3,000 population to act as insurance agents. *Id.* Senator Owen introduced the Comptroller's proposed legislation (changing the 3,000 figure to 5,000)⁵ as an amendment to a banking bill already under consideration by the 1916 Congress. It was enacted without discussion or debate.

⁵ This was the only apparent change from the Comptroller's proposal. 53 Cong. Rec. 11153 (1916). Senator Owen stated, "[t]he matter is unimportant either way." *Id.*

See United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc., 113 S. Ct. 2173 (1993); 53 Cong. Rec. 11001, 11153 (1916). The provision states:

In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided, however*, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

12 U.S.C. § 92 ("Section 92").⁶

⁶ By requiring banks to act only for companies authorized to do business in the State in which the bank is located, Section 92 limits banks' agency authority. Even if state law permits properly licensed agents to sell insurance on behalf of so-called "unauthorized" or "non-admitted" companies (and most did at the time, and do now), as a matter of federal law, national banks cannot act as such "surplus lines" agents. Congress' motivation here presumably was to avoid the personal liability assumed by such an agent if the unauthorized company is unable to pay claims. *See* Spencer L. Kimball, *Insurance and Public Policy* 286-88 (1960). A similar motivation to avoid liability obviously animated other limitations

Contrary to the view of Petitioner's *amici*, Section 92 was *not* made part of the National Bank Act. *United States Nat'l Bank of Oregon*, 113 S. Ct. at 2186. Rather, Section 92 was buried in a statute that amended numerous sections of the Federal Reserve Act of 1913. *See* Act of Sept. 7, 1916, ch. 461, 39 Stat. 752. That Act "created Federal Reserve banks and the Federal Reserve Board and required the national banks formed pursuant to the [NBA] to become members of the new Federal Reserve System." *U.S. Nat'l Bank of Oregon*, 113 S. Ct. at 2180.

There has never been a federal licensing system, federal consumer protections applicable to Section 92 banks or branches, or federal regulations governing national banks' solicitation and sales activities.⁷ Nor is there any evidence Congress intended to create a duplicate federal regulatory scheme for insurance agency activities of a few small-town national banks. The Office of the Comptroller of the Currency ("OCC") has neither the resources nor the expertise to duplicate state insurance regulatory schemes that have been in place for well over a century. To the contrary, Section 92's language itself acknowledges that *States* regulate the insurance business. *See* 12 U.S.C. § 92 (permitting banks to act only for state-authorized insurance companies).

Section 92, as well as its legislative history, is silent as to its effect on state law. For more than three-quarters

contained in Section 92—no guaranteeing premium payments or the accuracy of statements in applications for insurance. 12 U.S.C. § 92.

⁷ The recently adopted *Interagency Statement on Retail Sales of Nondeposit Investment Products* (Feb. 15, 1994) (reproduced at OCC NR 94-21, 2-17-94), to which *amici* refer, ABA Br. at 29, relates to only one product regulated by the States as insurance—annuities. This Court has held that national banks' authority to sell annuities is founded in 12 U.S.C. § 24 (Seventh) and not confined to small-town national banks under Section 92. *Nations-Bank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810 (1995). Thus, the *Interagency Statement* has no bearing on national banks' exercise of their Section 92 authority.

of a century, national banks were routinely subject to state laws governing insurance agency activity, including those state laws, such as § 626.988, that limit or prohibit banks from selling non-credit insurance. Congress never altered this practice, despite having twice enacted legislation pertaining to Section 92 and having discussed the provision's existence on numerous occasions. *See United States Nat'l Bank of Oregon*, 113 S. Ct. at 2176.

C. Barnett Seeks to Sell Non-Credit Insurance in Florida.

Petitioner is not a small-town national bank, and is not the type of entity with which Comptroller Williams was concerned in proposing Section 92—"a country bank" having difficulty competing with state-chartered banks. 53 Cong. Rec. 11001 (1916). Petitioner is a subsidiary of the largest bank holding company in Florida and "one of the largest bank holding companies in the Southeastern United States." R3-62-4. Petitioner's principal offices are in a city with a population far exceeding 5,000, but it maintains an office in Belleview, Florida, whose population is under 5,000. R3-62-1-2.

At the behest of its holding company, Barnett purchased Linda Clifford Insurance, Inc., a general-lines insurance agency located in Belleview. R3-62-2-4. Linda Clifford and her associate agents immediately became employees of the bank and operated the agency as a division of the bank. R3-62-3. Barnett's stated intention was to sell insurance from this small-town branch office to customers located anywhere. R3-62-2.

The bank's claimed authority was the Comptroller's expansive interpretation of Section 92 as permitting a bank to sell insurance so long as it had a single branch office in a small town, even if its home office was in a large city. *See* 12 C.F.R. § 7.7100. The OCC took the further position that national banks could use this one small-town office as a launching pad for nationwide insurance sales. *See* OCC Interp. Ltr. No. 366 [1985-87

Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986). Barnett intended to exploit these broad interpretations, but Florida law stood in its way.

D. The Proceedings Below.

The same day it purchased the insurance agency, Barnett filed suit seeking a declaration that Section 92 preempts any Florida law that curtails its ability to sell a full line of insurance products in the State, and seeking to enjoin the Department from revoking the bank employees' insurance agency licenses. Respondents intervened as defendants and, together with the Department, responded that Florida law governs the bank's insurance activities.⁸ After a bench trial at which representatives of the Department testified as to the purpose and function of § 626.988 in protecting Florida insurance policyholders, the District Court denied the bank the relief it requested. The Court held that, under the McCarran-Ferguson Act, § "626.988 is saved from preemption." 839 F. Supp. at 843, Pet. App. 35a.

The Eleventh Circuit unanimously affirmed. "Relying on the state court interpretations, testimony at trial, reference in the Florida statute to McCarran-Ferguson, and explicit instruction from the United States Supreme Court in [*Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453 (1969)] that regulatory protection of policyholders may be indirect," the Eleventh Circuit agreed that § 626.988 regulates the business of insurance, within the meaning of McCarran, "because it protects policyholders." 43 F.3d at 636, Pet. App. 12a-13a. As the court explained, the danger § 626.988 seeks to avoid "is the loss of arms-length transactions and objec-

⁸ Respondents also filed counterclaims asserting that, even if Section 92 authorizes Barnett's sale of insurance, such sales may be made only in the small town in which the bank is located and doing business. The District Court dismissed these claims as moot and the Court of Appeals did not reach the issue. The issue would have to be addressed on remand were this Court to reverse.

tivity when the bank becomes involved with insurer and insured." *Id.* Section 626.988 "is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders." *Id.* (quotation omitted). The Eleventh Circuit then concluded that Section 92 neither "specifically relates to the business of insurance" nor, quoting *Fabe*, 113 S. Ct. at 2211, "'specifically requires' . . . that apparently conflicting state laws be preempted." *Id.* at 637, Pet. App. 15a. The court accordingly concluded that § 626.988 need not yield to Section 92. *Id.*

SUMMARY OF ARGUMENT

This case will decide whether a simple federal authorization to some small-town national banks to sell insurance will eradicate well-established state regulation of insurance agents and their activities. At stake is not only whether national banks will be able to sell insurance throughout Florida by establishing one office in a small town—despite contrary state law—but whether they will be subject to the state regulatory prescriptions applicable to every other insurance agent in the State. For, although they struggle to suggest their view of preemption is tempered, Petitioner and its *amici* would displace any state law they deem impermissibly intrudes upon their purportedly indefeasible "right" to sell insurance. Despite its protestations to the contrary here, the OCC, asserting the preemptive effect of federal banking law, has expressly advised national banks that "[r]egardless of the form or subject of a regulatory scheme, a state 'cannot demand that a national bank or its employees be licensed.'"⁹ "There is absolutely no evidence the 1916 Congress that enacted Section 92 intended such a result, and every reason to believe the opposite result should obtain.

⁹ OCC Interp. Ltr. No. 475 [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,012, at 71,119 (March 22, 1989) (emphasis in original).

There are two independent reasons why Section 92 does not preempt the state law at issue. First, there is no conflict between Section 92 and Fla. Stat. § 626.988. Accordingly, even without regard to the McCarran-Ferguson Act, § 626.988 is not preempted. Second, even if there were a conflict between Section 92 and § 626.988, McCarran precludes displacement of Florida law.

First. As its text and legislative history make clear, Section 92 permits small-town national banks the corporate *authority* to sell insurance in order to enable them to compete with state-chartered banks that have such power under state law. Absent that grant of authority, national banks would have been prohibited, under federal law, from selling insurance even in States where state law would permit them to act as insurance agents. But there is no suggestion in the text or legislative history of Section 92 that Congress wanted to give national banks an indefeasible *right* to sell insurance, immune from evenhanded state regulation. The 1916 Congress was merely permitting small-town national banks to participate in private business that was universally understood to be regulated exclusively by the States.

Indeed, the text of Section 92—by requiring national banks to act only on behalf of state-authorized insurance companies—expressly recognized state control of the insurance business. Because sale of insurance through agents who were not licensed by the State could result in revocation of the company's authorization, Section 92's express limitation gives States the ultimate power to decide whether national banks can sell insurance. There is no reason to believe Congress would not want to leave to the States the decision whether banks should be permitted to sell insurance in a particular locale, so long as the prohibition applies to both state and national banks. Indeed, Congress' enactment of McCarran reflects a considered judgment that States are better suited to make such determinations.

Preemption doctrine does not assume all federally granted powers are indefeasible rights. Even in the banking context, an inquiry must be made into Congress' purposes in enacting the law at issue. Because Section 92's purpose was to eradicate the disadvantage faced by small-town national banks whose state-chartered competitors could sell insurance, § 626.988—which treats national and state-chartered banks the same—does not stand as an obstacle to the accomplishment of Congress' objectives. Petitioner cannot unambiguously demonstrate Congress' "clear and manifest intent" to preempt § 626.988, and therefore cannot overcome the strong presumption against preemption.

Second. The McCarran-Ferguson Act, which was enacted by Congress to ensure the continuing primacy of the States in the regulation of the insurance industry, also precludes an interpretation of Section 92 so as to supersede § 626.988. Section 626.988 is a consumer protection provision that regulates licensed insurance agents. Such laws are designed to impact the manner in which insurance risks are transferred or spread by assisting potential policyholders to obtain reliable insurance, appropriate for their needs. As both courts below correctly concluded, by precluding licensed agents from affiliating with banks, Section 626.988 protects potential policyholders at a very basic level by insulating them from the unfair coercion that appears to be endemic when banks are permitted to solicit the purchase of insurance products from their banking customers. Under this Court's controlling precedent, § 626.988 was therefore enacted "for the purpose of regulating the business of insurance."

In contrast, neither Section 92 nor the Federal Reserve Act in which it is contained specifies a congressional design to impact the "business of insurance" otherwise reserved to the States in McCarran: the manner in which insurance risks are transferred or spread through the insurer-insured relationship. The sole purpose of Section

92 is to provide an additional source of revenue for small-town national banks through the mechanism of additional charter authority—authority States could not, under any circumstances, grant. For this reason, Section 92 does not “specifically relate to the business of insurance” and it may not be construed to invalidate, impair, or supersede Section 626.988.

ARGUMENT

I. SECTION 92 DOES NOT PREEMPT § 626.988 UNDER TRADITIONAL PREEMPTION ANALYSIS.

Petitioner and the Comptroller dismiss the argument that Section 92 does not displace § 626.988 under traditional preemption analysis, and move directly to attack the Eleventh Circuit’s holding under McCarran. But this Court need not reach the McCarran issue because, even under “ordinary” preemption doctrine, § 626.988 is not preempted.¹⁰

A. There Is a Strong Presumption That Congress Did Not Intend Section 92 to Preempt § 626.988—a Presumption That Can Be Overcome Only With “Unambiguous” Evidence to the Contrary.

Preemption is always a question of congressional intent: did Congress intend to preclude the application of state law? *E.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). And “[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did *not* intend to displace state law.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (emphasis added). Preemption, therefore, is not favored “in the

¹⁰ Contrary to the OCC’s statement, neither court below “acknowledged that the state and federal laws are in irreconcilable conflict.” OCC Br. at 8 (citations omitted). The courts merely noted that there was an “alleg[ed]” (Pet. App. 6a) or “assert[ed]” (*Id.* at 24a) conflict between Section 92 and § 626.988. Although the issue was fully presented and argued, neither court reached the traditional preemption question given their McCarran holdings.

absence of persuasive reasons.” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

These general constraints are heightened in this context. “[I]n cases like this one, where federal law is said to bar state action in fields of traditional state regulation, see *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 719 (1985), [the Court has] worked on the ‘assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose of Congress.*’ *Rice [v. Santa Fe Elevator Corp.]*, 331 U.S. 218, 230 [(1947)].” *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1676 (1995) (emphasis added) (citing numerous cases). Accordingly, this Court cannot “conclude that Congress legislated the ouster of [Florida law] in the absence of an unambiguous congressional mandate to that effect.” *Florida Lime & Avocado Growers*, 373 U.S. at 146-47.

Because Section 92 contains no express preemption provision, Congress’ preemptive intent, if any, must be inferred. And this Court has been “reluctant to infer preemption.” *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978). Since Congress has not entirely displaced state regulation of national banks, *supra*, at 7-8, it is clear that Congress intended Section 92 to preempt state law, if at all, only to the extent the state law “actually conflicts with federal law.” *Cipollone*, 505 U.S. at 516. “Such a conflict arises when ‘compliance with both federal and state regulations is a physical impossibility,’ . . . or when state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Hillsborough*, 471 U.S. at 713 (quoting *Florida Lime & Avocado Growers*, 373 U.S. at 142-43, and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Petitioner must present a “clear and manifest,” “unambiguous” showing of conflict “that is strong enough to overcome the presumption that state and local regu-

lation . . . can constitutionally coexist with federal regulation." *Id.* at 716.

B. Petitioner Cannot Demonstrate That Preemption Was the "Clear and Manifest Purpose of Congress."

Petitioner cannot "overcome the presumption against finding pre-emption of state law." *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). As both Petitioner and the OCC recognize, the only possible basis for a finding of preemption here would be if Section 626.988 impermissibly interferes with the purposes of Section 92. See Petr. Br. at 15; OCC Br. at 9.¹¹ Because there is no dispute "that Section 92 permits small-town national banks . . . to sell insurance," Petr. Br. at 14, the fundamental question is whether the *purpose* of that grant of permission was "to create an 'option' in the strong sense of that word: that Congress intended to create a legal *right* to [sell insurance], a right immune from significant state interference." *Massachusetts Medical Soc'y v. Dukakis*, 815 F.2d 790, 792 (1st Cir.) (Breyer, J.), *cert. denied*, 484 U.S. 896 (1987).¹² Section 92 cannot be read to confer on small-town national banks such a *right*—as opposed to the mere *power*—because

¹¹ Compliance with both statutes is not a "physical impossibility." No one argues there are conflicting legal obligations placed on national banks by the two provisions. Compare *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 284 (1896).

¹² In *Massachusetts Medical*, the First Circuit concluded that there was no clear and manifest evidence that Congress intended a provision of the federal Medicare Act that permits physicians to "balance bill" to preempt a Massachusetts law prohibiting the practice. The court reasoned that Congress' decision not to ban balance billing did not necessarily translate into a federal prohibition against state regulation of the practice. 815 F.2d at 794. The congressional decision to permit, the court explained, "is perfectly consistent with later decisions by individual states to regulate balance billing on their own." *Id.*; accord *Pennsylvania Medical Soc'y v. Marconis*, 942 F.2d 842 (3d Cir. 1991).

Petitioner cannot demonstrate that "Congress has *unmistakably so ordained*." *Florida Lime & Avocado Growers*, 373 U.S. at 142 (emphasis added).

1. *Neither the text, historical context, nor the legislative history of Section 92 indicates Congress' "unmistakabl[e]" purpose to create a right immune from evenhanded state regulation.*

The language of Section 92 suggests Congress did not intend to confer a right valid against state prohibition. Section 92 "nowhere includes the word 'right' or any other language suggesting creation of a right immune from state interference." *Massachusetts Medical*, 815 F.2d at 794. Neither the statute nor its legislative history states, for example, that small-town national banks "may sell insurance all state laws to the contrary notwithstanding."

In 1916, some States statutorily prohibited banks from acting as insurance agents,¹³ but neither the text nor the legislative history of Section 92 even hints at any intent to preempt those state laws. Nor is there any evidence Congress intended small-town national banks to operate outside the States' insurance regulatory scheme, without state licensure—a proposition that itself would require preempting state licensing requirements. Given that this area of regulation was well-recognized as exclusively one of state control, and that state regulation was well-developed at the time, preemptive intent "would have seemed significant and unusual enough to have warranted

¹³ For example, Wisconsin, along with other States, prohibited corporations from acting as insurance agents. Morton Keller, *The Life Insurance Enterprise, 1885-1910*, at 258 (1963). Relying upon this statutory prohibition, the Wisconsin Attorney General ruled in 1917 that a national bank could not act as agent for an insurance company, despite Section 92. Kimball, *supra*, at 119-20.

mention." *Massachusetts Medical*, 815 F.2d at 794.¹⁴ Congress' utter silence on the question whether Section 92 conferred a right to sell insurance valid against state interference is strong evidence that it did *not* intend Section 92 to have preemptive effect. Cf. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 86 (1987) ("The long-standing prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws . . . , it would have said so explicitly.").

Indeed, the text of Section 92 itself recognizes state regulation of national banks' agency activity. Section 92 permits national banks to act as agent only for companies the State has authorized to do business. 12 U.S.C. § 92. This restriction necessarily entails the requirement that the national bank itself become licensed by the State. When Section 92 was enacted, virtually every State, if not all States, prohibited the sale of insurance through an agent who was not licensed by the State. See *Patterson*, *supra*, at 161 (citing civil and criminal penalties for violation). Selling insurance through unlicensed agents was grounds for rescission of the company's state-issued authorization. *Id.* at 133 & n.73, 154 & n.182 (citing state statutes). Thus, if the bank (or its employees) were not licensed by state insurance authorities, insurance sales by the banks could result in loss of authorization for the insurance company; hence the national bank, under the *express terms* of Section 92, would be precluded from acting as its agent. In other words, Section 92 gave States the ultimate power to decide whether national banks could sell insurance.

Moreover, the historical context and legislative history persuasively demonstrate that it was not Congress' intent to grant small-town national banks a right to sell insurance that would operate to supersede state laws that pro-

¹⁴ Only two years earlier, unsuccessful proposals had been made to amend the Constitution to enable Congress to regulate the business of insurance, which clearly was understood to include the licensing of agents. *Supra*, at 4.

hibit state and national banks alike from acting as agent. As Petitioner recognizes, Section 92's legislative history makes clear that the statute was proposed and enacted to permit small-town national banks to take advantage of "'additional sources of revenue' to 'place them in a position where they could better compete with local State banks and trust companies.'" Petr. Br. at 3 (quoting 53 Cong. Rec. 11001 (1916)). The competitive problem arose, the Comptroller explained in the very sentence Petitioner quotes, because state banks "[we]re sometimes authorized under the law to do a class of business not strictly that of commercial banking." 53 Cong. Rec. 11001 (1916).

Absent federal legislation, however, national banks could not similarly take advantage of non-banking business opportunities. By 1916, it was "settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established." *California Bank v. Kennedy*, 167 U.S. 362, 366 (1897) (citing *Logan County Nat'l Bank*, 139 U.S. at 73). And, as Comptroller Williams explained, national banks were "not given either expressly nor by necessary implication the power to act as agents for insurance companies." 53 Cong. Rec. 11001 (1916). It was "universally understood that no national banks possessed any power [under federal law] to act as insurance agents." *Saxon v. Georgia Ass'n of Indep. Ins. Agents*, 399 F.2d at 1013 (emphasis in original).

Section 92 was proposed to rectify this competitive disadvantage. It augmented small-town national banks' charter authority so that they "may be permitted to act as agents for insurance companies in the placing of policies of insurance." 53 Cong. Rec. 11001 (1916). Thus, it was no longer *ultra vires* under federal law for these national banks to sell insurance. As the OCC stated as

recently as 1985, Section 92 does no more than "authoriz[e] some activities for small town banks that would otherwise be impermissible" as a matter of federal law. OCC Interp. Ltr. No. 331 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501, at 77,776 (Apr. 4, 1985). But by removing this limited insurance activity from the more general *federal* bar to non-banking activities by national banks, Congress did not express an intent to preempt the *States'* traditional power to regulate insurance conduct within their small towns.

Thus, the purpose of Section 92 was to place small-town national banks on more equal footing with state-chartered banks—to ensure they would not be disadvantaged.¹⁵ See also *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375 (1954) (noting that Congress expanded national banks' federal charter powers over time so "[t]hat these federal institutions may be at no disadvantage in competition with state-created institutions"); *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 133 (1969) (noting that "[t]he policy of competitive equality is . . . firmly embedded in the statutes governing the national banking system"); *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) (noting Congress' "policy of equalization [between state and national banks] first adopted in the National Bank Act of 1864"). Section 92 advanced that purpose by permitting national banks to engage in an area of commerce that was, at the time, believed to be one of exclusive state control. States alone

¹⁵ Because the bill's sponsor, Senator Owen, adopted the 1916 Comptroller letter as the sole justification for Section 92's enactment, it "deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); accord *Zuber v. Allen*, 396 U.S. 168, 192 (1969). In addition, as a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion," the 1916 Comptroller statements are entitled to great weight. *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933); accord *Mountain States T. & T. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985).

licensed insurance agents, set standards for their qualifications, and regulated their agency activities.¹⁶ A state law—like Section 626.988—that evenhandedly restricts the ability of state and national banks to sell insurance does not stand as an obstacle to Congress' objective that small-town national banks not be placed at a competitive disadvantage relative to state-chartered banks.

2. The evidence suggests Congress did not want national banks to sell insurance where state banks were prohibited from doing so.

Because it is Petitioner's heavy burden to demonstrate unambiguous congressional intent to preempt such evenhanded state laws—a burden that Petitioner has not even attempted to satisfy—Respondents need not establish that Congress affirmatively intended *not* to preempt such laws. However, a consideration of the full probable purposes animating Section 92 suggests Congress could well have intended that small-town national banks *not* enjoy the right to sell insurance in those States that restricted or prohibited the sale of insurance by banks generally.

Congress' decision to limit Section 92's grant of power to sell insurance to *small-town* national banks indicates that Congress considered such authority to be, at best, a necessary evil. Comptroller Williams explained there were significant costs involved in allowing banks to sell insurance—resulting in banks becoming "department stores" and diverting bankers' attention from "the legitimate business of banking [that] affords ample scope for the energies of trained and expert bankers." 53 Cong. Rec. 11001 (1916). But the Comptroller believed the costs were outweighed by the potential benefits in the narrow context of small national banks in country towns and villages. Those banks were experiencing competitive disequilibrium

¹⁶ This is not to say Congress lacked the constitutional authority to grant national banks the federal charter capacity to sell insurance. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Congress has implied power to charter national banks to implement its fiscal powers).

produced when local state-chartered banks were permitted to engage in some non-banking activities (sale of insurance and brokerage of real estate loans).¹⁷ So long as small-town national banks could engage in those same activities, there was no reason to believe they would be at a competitive disadvantage. *See id.* Conversely, Congress could anticipate that if a State determined its small-town banks should *not* sell insurance, evenhanded application of that same prohibition to both national and state banks would not place the former at a relative disadvantage.

There is no evidence Congress thought small-town national banks were in such precarious financial position that they needed the absolute right to sell insurance, even in those States that determined small-town banks should not engage in such activity. Insurance sales authority was never deemed to be an "incidental power necessary to carry on the business of banking" under Section 24 (Seventh) of the National Bank Act. *See supra*, at 8, 21. And Congress did not include the additional authority among the banking powers enumerated in Section 24; indeed, it did not include Section 92 in the National Bank Act at all. *See United States Nat'l Bank of Oregon*, 113 S. Ct. at 2186. The Comptroller does not contend a national bank small-town office's exercise of its Section 92 authority is "critical to 'the financial stability of the association.'" *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982) (citation omitted). There is no evidence Section 92 is a source of authority "essential to the economic soundness of the [national bank] industry," *id.*, or that any of national banks' banking "functions, especially as a source for federal credit, depend upon their success" in selling insurance. *Franklin Nat'l Bank*, 347 U.S. at 375.

¹⁷ As originally proposed by Comptroller Williams and enacted, Section 92 also permitted small-town national banks to broker real estate loans. That provision was repealed in 1982. Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, Tit. IV, § 403(b), 96 Stat. 1511.

In fact, for three-quarters of a century—from 1916 until the 1980s—national banks were routinely subject to state-law limitations on the exercise of their Section 92 powers. And a majority of States place some restriction on the ability of banks to sell insurance. There is no evidence national banks suffered or refused to locate or closed in those States during this period, or that residents of small towns in those States had difficulty obtaining banking services.¹⁸

The decision whether the potential harm of banning banks from selling insurance outweighs its potential good is obviously complicated, and history has demonstrated that the answer will vary from State to State. Petitioner "provides no convincing theoretical or logical reason why Congress would not, or could not, have wanted to leave such a decision to the states. After all, a state is ordinarily as concerned as the federal government to see that its . . . citizens enjoy [the services they need]. A state would not normally wish to impose a ban that would hurt those citizens more than it helped them. Indeed, a state would likely be *more* cautious than the federal government." *Massachusetts Medical*, 815 F.2d at 795 (emphasis in original). "Moreover, to the extent that relevant economic conditions vary from state to state, an individual state may better be able to strike the balance" in a way that best serves its citizens. *Id.*

¹⁸ Even assuming that it is important for the survival of small-town national banks to obtain fees from insurance sales, there are numerous ways in which banks can obtain fee income short of acting as agent. For example, national banks may lease office space to insurance agencies or may purchase group policies and market them to their banking customers, collecting fees for administrative services. National banks are widely utilizing these powers even in States that would not permit bank employees to act as agents. Furthermore, every State permits banks, including national banks, to sell credit-related insurance. This activity generally permits banks to collect extremely high commissions, and lending institutions have captured nearly 100% of the market.

Indeed, Congress' enactment of the McCarran-Ferguson Act is a concrete manifestation of its belief that the States are better situated to make decisions regarding the conduct of the insurance business—regardless of what entities are involved: "One of the major arguments advanced by proponents of leaving regulation to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government." *FTC v. Travelers Health Ass'n*, 362 U.S. at 302; see also *Hartford Fire Ins. Co. v. California*, 113 S. Ct. at 2901; 91 Cong. Rec. 1087 (1945).

C. Petitioner's View That All Grants of Power to National Banks Are Necessarily Indefeasible Rights Is Manifestly False.

Contrary to Petitioner's assertions, the conclusion that Congress did not intend Section 92 to preempt state law is not a novel result. See Petr. Br. at 12. This Court has often held that a federal authorization was not intended to confer an absolute right and thus does not conflict with state law that prohibits or limits the same activity. See, e.g., *Pacific Gas & Elec. Co. v. State Energy Res. Con. & Dev. Comm'n*, 461 U.S. 190 (1983) (holding Atomic Energy Act, which authorizes and regulates the construction of nuclear powerplants, does not preempt state law prohibiting the construction of such plants); *id.* at 205-06 (noting Act "does not at any point expressly require the States to construct or authorize nuclear powerplants or prohibit the States from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors"); *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 131-32 (holding state law prohibiting price discrimination in situations where discrimination would be permitted by Clayton Act, as amended by Robinson-Patman Act, creates no conflict because the federal law was not intended to create a "right" to discrim-

inate); *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265, 280-81 (1977) (construing federal fishing licenses, which confer the "'authority to licensed vessels to carry on' the activity [of fishing]," to be consistent with state-law restrictions that treat federal licensees the same as state residents); see also, e.g., *Pennsylvania Medical Soc'y v. Marconis*, 942 F.2d 842 (3d Cir. 1991); *Massachusetts Medical, supra*.

The fact that Section 92 involves national banks does not dictate a contrary result. Although the familiar distinction between "powers" and "rights"¹⁹ makes clear that a federal grant of authority is not necessarily frustrated by a state law prohibiting the exercise of that authority, Petitioner appears to contend that all national bank powers are inherently indefeasible rights. See Petr. Br. at 15. If Petitioner means to suggest that all powers conferred upon national banks are ipso facto rights that cannot be negated by state restrictions, its claim is belied by the very cases Petitioner cites: *de la Cuesta* and *Franklin National Bank*. Those cases demonstrate that this Court has always recognized that whether a state law that forbids a national bank to exercise an express power conflicts with the federal statute depends entirely upon the congressional purpose behind the particular authorization. It is, in other words, a matter that demands interpretation of the particular federal statute at issue.

De la Cuesta involved a challenge to the validity of a state law that barred S&Ls from using due-on-sale clauses in their loan agreements despite a federal regulation that expressly authorized S&Ls to employ such provisions. The Court held the state law was preempted because it found "unambiguous" the federal intent to preempt. 458 U.S. at 154. This was so both because the historical context demonstrated that the regulation was implemented amidst "increasing controversy" over the

¹⁹ See generally Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913-14).

precise question whether S&Ls could exercise the clause in the face of state restrictions, and because of clearly stated expression of preemptive intent. *See id.* at 145-47.

In *Franklin National Bank*, the Court concluded that national banks' ability to attract deposits was critical to their functioning as a source of federal credit, 347 U.S. at 375, and that their ability to use the word "savings" in advertisements was "one of the most usual and useful of weapons" in competition, *id.* at 376. The Court thus read the NBA as "declaratory of the right of a national bank to enter into or remain in [the business of receiving savings deposits]" and of the "right to let the public know about it" by using the word "savings." *Id.* at 377-78 (emphasis added). In short, the Court held the state law prohibition on use of the word "savings" except by certain state-chartered banks was preempted because it interfered with an "incidental power . . . necessary to carry on the business of banking." *Id.* at 376 (quoting 12 U.S.C. § 24).

Lower federal courts have recognized that both *de la Cuesta* and *Franklin National Bank* proceeded on the understanding that whether a particular federal grant of capacity to national banks is to be construed as an indefeasible right requires a case-by-case inquiry into the particular congressional purpose animating that grant of power. *See Pennsylvania Medical*, 942 F.2d at 856-57; *Massachusetts Medical*, 815 F.2d at 796. Indeed, this simple truth follows necessarily from the more general proposition—recognized in national bank cases as elsewhere—that the existence of a preemptive conflict between state and federal law turns upon congressional intent. *See, e.g., Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 33 (1875) ("The point to be sought is the intent of the law making power.").

Moreover, in other decisions, the Court has relied upon evidence of congressional intent to conclude that particular powers conferred upon national banks were *not* intended to be indefeasible rights, and therefore do not preempt superficially conflicting state law. *See, e.g., First*

Nat'l Bank v. Dickinson, 396 U.S. at 138 (rejecting "a systematic attempt to secure for national banks . . . privileges which Florida denies to competing state banks," and holding that Florida could bar national banks, along with state banks, from operating, *inter alia*, an armored car service); *McClellan v. Chipman*, 164 U.S. 347 (1896) (holding that the power of national banks to hold and convey real estate for purposes specified by federal law is subject to prohibitions on the transfer of property imposed by nondiscriminatory state law).

All of the cases upon which Petitioner and its *amici* rely in which the Court has concluded that a federal authorization to national banks preempts restrictive state law concern national banks' *banking* powers. It is absolutely clear that Congress intended, in enacting the NBA, to create a banking system separate and apart from the state banking system. *Supra*, at 7 & n.4. It was precisely the desire to depart from a state-controlled monetary system that led Congress to establish national banks. *Id.* Thus, this Court has repeatedly said state laws cannot restrict national banks' core banking activities—the very reason they were created. To do so would frustrate clear congressional intent to establish a "dual" banking system. Nonetheless, in certain circumstances, Congress has expressly indicated that national banks' banking activities are subject to state regulation. The absence of such reference in Section 92 is not surprising, considering its subject matter is not banking activities but rather the authorization to participate in private commerce that was *exclusively* regulated by the States. Consequently, the fact that the text of Section 92 does not more explicitly condition its grant of authority on compliance with all state regulations is "[f]ar from the compelling congressional direction on which pre-emption in this case would have to be predicated." *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 540 (1979).²⁰

* * * *

²⁰ The *Franklin* decision itself recognized that, even as to national banks' exercise of their *banking* powers, federal law need

In sum, Section 626.988 presents no obstacle to the realization of Congress' purpose in enacting Section 92: to empower small-town national banks to meet competition from state-chartered banks that were authorized by state law to sell insurance. Section 626.988 simply levels the playing field between state-chartered and national banks. Allowing States to restrict equally the insurance sales activities of state and national banks does not undermine the ability of national banks to provide banking services, the reason for their creation. Put otherwise, Petitioner cannot overcome the strong presumption against preemption and demonstrate that Section 92 confers a "right" in the strong sense as to which § 626.988 creates an "obstacle."²¹ There is no evidence of Congress' "clear and manifest intent" to preempt.

not expressly preserve state authority to regulate the bank in order for state law to apply. See 347 U.S. at 378 n.7. As noted *supra*, the text of Section 92 does expressly contemplate continued state regulation of insurance agents, and does limit its grant of authority to sales on behalf of state-authorized insurance companies.

²¹ Because the preemption question is a pure question of law that does not implicate "practical agency expertise," which is "one of the principal justifications behind *Chevron* deference," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990), the OCC does not attempt to contend that its opinions on the issue are entitled to deference. Indeed, a federal statute's failure to speak on the preemption issue does not create "a statutory 'gap' within the meaning of *Chevron* . . . , that Congress intended [the agency] to fill." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Moreover, "[a] precondition of deference under *Chevron* is a congressional delegation of administrative authority," *id.*, of which none has been made here. Compare 12 U.S.C. §§ 36(f)(1)(A)(ii), 43 (delegating authority to the Comptroller to determine the applicability of state laws to interstate bank branching operations and establishing notice and comment procedures). Given the necessity of reconciling Section 92 with McCarran—a statute that falls well outside the Comptroller's purview—the absence of such a delegation is especially pertinent here. Finally, even if none of the above were true, the OCC has failed to issue any formally promulgated regulations to which deference would be appropriate here. See *Hillsborough County*, 471 U.S. at 718 (concluding that

II. THE McCARRAN-FERGUSON ACT ALSO MANDATES THAT SECTION 92 NOT BE DEEMED TO SUPERSEDE SECTION 626.988.

If the Court determines Section 92 would preempt § 626.988 under a traditional preemption analysis, it must then determine whether the McCarran-Ferguson Act mandates that Florida law should nevertheless apply to national banks. McCarran imposes a "reverse preemption" rule affirming "the supremacy of the States in the realm of insurance regulation." *Fabe*, 113 S. Ct. at 2207. In seeking to preserve this exclusive state domain, McCarran "overturn[ed] the normal rules of preemption" for state laws that regulate the "business of insurance." *Fabe*, 113 S. Ct. at 2211. Because § 626.988 was enacted by Florida "for the purpose of regulating the business of insurance," McCarran mandates that Section 92—a federal provision that does *not* "specifically relate to the business of insurance"—not be construed to "invalidate, impair, or supersede" that state law.

A. Section 626.988 Was Enacted "for the purpose of regulating the business of insurance."

As both the Petitioner and the OCC concede, the scope of the first clause of McCarran's Section 2(b) is very broad and encompasses all state laws that have the "end, intention, or aim of adjusting, managing, or controlling the business of insurance." *Fabe*, 113 S. Ct. at 2210 (citation omitted); see *Petr. Br.* at 25, 36; *OCC Br.* at 10.²² Relying on the Court's decision in *SEC v. National*

courts can expect agencies to make clear in their regulations when federal law governs exclusively).

²² This Court has specifically distinguished the broad general immunity from preemption by *any* federal law conferred in the first clause of Section 2(b), from the much narrower immunity from preemption by federal *antitrust* law conferred in the Section's second clause:

[T]he first clause of § 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance. The second clause

Securities, the Court in *Fabe* held that this test is satisfied by state laws "aimed at protecting or regulating th[e] relationship" between the insurer and the insured. 113 S. Ct. at 2208 (quoting *National Securities*, 393 U.S. at 460).²³

Applying this standard in *National Securities*, the Court ruled that state laws pertaining to "[t]he selling and advertising of policies, and the licensing of companies and their agents . . . are . . . within the scope of [McCarran]." 393 U.S. at 460 (citing *FTC v. National Casualty Co.*, 357 U.S. 560 (1958) (*per curiam*), and *Robertson v. California*, 328 U.S. 440 (1946)). In making this observation, the Court discussed McCarran's focus:

[I]t is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

National Securities, 393 U.S. at 460.

As the Court explained in *Robertson* in concluding that insurance agent licensing laws fall within McCarran, such laws are

designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship. That such dangers may exist, may even be widely prevalent in the absence of such controls, is a matter of common knowledge and experience.

accomplishes Congress' secondary goal, which was to carve out only a narrow exemption for "the business of insurance" from the federal antitrust laws.

Fabe, 113 S. Ct. at 2210 (citations omitted) (emphasis added).

²³ The dissent would have applied the same test, but would have reached a different result only because, in its view, the state law at issue did not regulate the relationship between the insurer and the insured. See *Fabe*, 113 S. Ct. at 2213-17 (Kennedy, J., dissenting).

328 U.S. at 447.²⁴ Such licensing laws, like laws governing the solicitation and sale of insurance policies, protect the insurer/insured relationship by attempting to ensure that prospective policyholders obtain reliable insurance that best meets their needs. In this way, the state laws directly impact the "spreading or transfer of risk" on which the Court focused in crafting a definition of the "business of insurance" in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).²⁵ See Macey & Miller, *supra*, at 25 (McCarran "extends to a broad range of activities for which an insurance company or agent would need to obtain a license under state law").

In asserting that Florida's prohibition on licensed agents' affiliation with banks was not "enacted for the purpose of regulating the business of insurance," Petitioner postulates that licensing laws do

not concern the relationship between insurer and insured, the type of insurance policy that is issued, the rights and obligations of the parties to the insurance contract, or the interpretation and enforcement of such a policy.

Petr. Br. at 36. Similarly, the OCC opines that licensing and unfair trade practices regulations such as § 626.988 do "not affect how the insurance business is conducted in Florida." OCC Br. at 10. But Petitioner and its *amici* completely ignore the vital role, recognized by this Court

²⁴ See also John A. and Jean Appleman, *Insurance Law and Practice* § 8632, at 5 (rev. ed. 1981) (licensing laws are enacted "to protect the public from surrendering its money in exchange for questionable or worthless pieces of paper denominated insurance policies").

²⁵ In *Royal Drug* and *Pireno*, the Court, in the course of analyzing whether the state laws at issue were preempted by federal antitrust laws under the *second* clause of Section 2(b), identified three factors useful in examining whether a given practice is within the "business of insurance." Both the majority and the dissent in *Fabe* indicated that these factors have some role in analysis under the first clause of Section 2(b). See 113 S. Ct. at 2208; *id.* at 2216 (Kennedy, J., dissenting).

in *National Securities*, *National Casualty Co.*, and *Robertson*, that laws regulating the marketing and sale of insurance—including agent licensing regulations—play in increasing the expected reliability and appropriateness of insurance policies that are ultimately purchased. This omission is fatal to their arguments.

1. The purpose of the Florida law is to protect policyholders.

Petitioner's and its *amici*'s assertions that the purpose of § 626.988 is directed at something other than the protection of policyholders and the insurer-insured relationship are misplaced. First, Section 626.988 is part of a comprehensive regulatory scheme designed to insulate the insurance consumer from sales practices the State deems unfair. The Florida Legislature deliberately placed § 626.988 in the Unfair Insurance Trade Practices Act.²⁶ As the "Declaration of Purpose" of that Act states:

The purpose of this part is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress) [McCarran-Ferguson Act], by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Fla. Stat. § 626.951(1). A "policyholders' bill of rights" also included within the Act further delineates the underlying purposes by identifying the principles that should guide the Department in applying all its substantive terms. These rights include:

- (a) . . . the right to competitive pricing practices and marketing methods that enable them to determine the best value among comparable policies.

* * *

²⁶ See Fla. Laws 1976, c. 76-260; Fla. Laws 1974, c. 74-35, § 1.

- (c) . . . the right to insurance advertising and other selling approaches that provide accurate and balanced information on the benefits and limitations of a policy.

* * *

- (e) . . . the right to be serviced by a competent, honest insurance agent or broker. [and]

* * *

- (g) . . . the right to an insurance company that provides an economic delivery of coverage and tries to prevent losses.

Fla. Stat. § 626.9641(1). In addition to the prohibition on insurance agent affiliations with banks, the Act proscribes a broad array of other unfair trade practices including misrepresentations in advertising, *id.* § 626.9541(1)(a), providing other false information, *id.* § 626.9541(1)(b), making insurance transactions through credit card facilities, *id.* § 626.9541(1)(q), and various forms of discrimination.²⁷ The obvious and stated intent underlying the proscription of all of these practices is to free insurance consumers from misleading and coercive influences in an effort to permit them to make the most informed, reliable, and appropriate purchase choice possible.

Second, Florida courts have unequivocally concluded that § 626.988 was enacted for the purpose of protecting insurance policyholders by preventing unfair and deceptive trade practices by banks, undue concentration of resources in banks, and harm to Florida insurance consumers through such forces as indirect and direct bank coercion. See *Glendale Fed. Sav. & Loan Ass'n v. State Dep't of Ins.*, 587 So. 2d 534, 535 n.1 (Fla. Dist. Ct. App. 1st Dist. 1991), *rev. denied*, 599 So. 2d 656 (Fla.

²⁷ Section 626.988 is thus not a mere "pin-pointed" exclusion. See *Petr. Br.* at 33. Even if § 626.988 were an isolated prohibition, however, McCarran would apply on its own terms as it protects "any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b) (emphasis added).

1992); *Production Credit Ass'ns v. Department of Ins.*, 356 So. 2d 31, 32 (Fla. Dist. Ct. App. 1st Dist. 1978) ("The Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest."). Contrary to Petitioner's suggestion, these conclusions were not speculative; the state courts found these were the statute's actual goals.²⁸ The federal question whether a particular state law was "enacted for the purpose of regulating the business of insurance" turns on the "design[]" or "goal[]" of the state law, *Fabe* 113 S. Ct. at 2212, which is an issue of state law. *E.g.*, *Michael M. v. Superior Ct. of Sonoma County*, 450 U.S. 464, 470 (1981) (plurality opinion). Thus, the fact that Florida courts have consistently held that § 626.988 was enacted to protect policyholders demonstrates it was enacted "for the purpose of regulating the business of insurance."

Third, two Department officials who have been primarily responsible for enforcing and promulgating regulations under § 626.988 over the last fifteen years gave uncontroverted testimony confirming the validity of each of the concerns identified in the body of the Unfair Insurance Trade Practices Act and by the *Glendale* and *Production Credit* courts, and demonstrating how the statute works to protect policyholders by alleviating each of these concerns.²⁹ They each testified, for example, that

²⁸ It is irrelevant that the *Glendale* findings were in the context of an equal protection challenge. A state court's legal determination regarding a state-law issue is not limited to the particular federal-law context in which it is made. *See, e.g.*, *Fischer v. Bar Harbor Banking & Trust Co.*, 857 F.2d 4, 7 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989). Moreover, the *Production Credit* decision was solely in the context of interpreting § 626.988's reach.

²⁹ The experience of those responsible for administering, enforcing, and promulgating regulations under a statute are valuable in interpreting the statute. *See, e.g.*, *Doe v. City of Butler*, 892 F.2d 315, 324 (3d Cir. 1989); *Deshotels v. SHRM Catering Servs., Inc.*, 845 F.2d 582, 585 (5th Cir. 1988); *Glendale*, 587 So. 2d at 535 n.1.

the statute prevents coercion by recognizing the inherently coercive power of a situation in which the institution extending credit is also the institution marketing insurance. *See* R5-23, 77 (testimony of Messrs. Dowdell and Shropshire); *see also* Br. for Resps. Bill Nelson, *et al.* at Point I-E (further discussing this trial testimony and its significance).³⁰

2. The fact that § 626.988 is exclusionary does not disqualify it as "regulation."

The OCC initially concedes that "[g]enerally applicable education, experience, or financial responsibility requirements for obtaining an insurance agency license would" constitute sales and licensing regulations within the ambit of McCarran. OCC Br. at 12. The OCC further concedes that at least some categorical exclusions from agent licensure would fall within McCarran. *Id.* at 13. Indeed, the OCC's only condition on such exclusions is that they be "relevant to the protection of present or potential policyholders." *Id.* Because § 626.988 is designed for, and serves, just such a purpose, it satisfies the OCC's test.

Petitioner, however, disagrees with that test. It takes a more categorical position, arguing that excluding an entity from selling insurance cannot constitute regulation of the business of insurance. Petr. Br. at 20-22. According to Petitioner, any such exclusion is the "regulation" of the excluded entity—here the regulation of banks. *Id.* (citing *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388,

³⁰ Despite this evidence, Petitioner argues § 626.988's "real purpose" was to protect insurance agents from competition, and relies solely on one small portion of the preamble to the bill that was rejected by the Florida Legislature prior to passage. *See* Petr. Br. at 18-19. Even if the preamble were evidence of the enacting Legislature's purpose, it would only further demonstrate that § 626.988 was designed to protect policyholders by eliminating coercive forces that could induce potential policyholders to accept insurance policies ill-suited to their needs. *See* Petr. Br. App. at 5a-7a (reproducing the preamble).

392 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3069 (U.S. July 13, 1995) (No. 95-74), Pet. App. 48a). As common sense dictates, however, "State power to regulate necessarily includes the discretion to prohibit, permit, or limit insurance practices as the state sees fit." *Dexter v. Equitable Life Assurance Soc'y of the United States*, 527 F.2d 233, 236 (2d Cir. 1975); *accord In re Workers' Comp. Ins. Antitrust Litig.*, 867 F.2d 1552, 1557 n.9 (8th Cir.), *cert. denied*, 492 U.S. 920 (1989).

This Court has been neither "able [n]or willing to draw lines by calling a law 'prohibitory' or 'regulatory.'" *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963). Thus the Court has repeatedly refused to accept "exclusion does not constitute regulation" arguments. *E.g.*, *Barsky v. Board of Regents*, 347 U.S. 442, 451 (1954) (viewing exclusion of felons from licensed activity as regulation of activity, not of felons); *Williamson v. Lee Optical*, 348 U.S. 483, 490-91 (1955) (viewing exclusion of eye examiners from retail merchandise space as regulation of optometry). Indeed, in the insurance context, this Court has held that excluding undertakers from the sale of life insurance is a permissible regulation of that business. *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949). The *Daniel* Court concluded that such state-law exclusion is designed to further the interests of purchasers of insurance. *Id.* at 222-23. Florida's exclusion of banks from selling insurance is animated by the same goal.

3. Section 626.988 is not aimed at regulating banks or the business of banking.

Finally, Petitioner and its *amici* contend § 626.988 really regulates the "business of banking" because: (1) the coercion being prevented is in the banking relationship; (2) other laws already prevent banks from tying insurance to bank products; and (3) § 626.988 does not foreclose all banks from selling all forms of insurance. Each argument is unfounded.

First, although Petitioner appears not to question that the Florida Legislature's purpose in enacting § 626.988 was to prevent bank coercion of its customers (through tying or otherwise), it erroneously claims such prevention is the regulation of the business of *banking*. See Petr. Br. at 22; OCC Br. at 6, 16. Section 626.988 is not concerned with banks' marketing of their banking products. Section 626.988 is animated by the concern that banks' control of credit will induce Florida residents to purchase insurance from the bank that is not needed by or suited to the customer. Even if bank insurance agents do not overtly tie insurance products to banking products, insurance customers will believe they should purchase insurance from the bank to solidify their credit relationship. It is only in banks' role as *insurance agents* and bank customers' role as *insurance policyholders* that § 626.988 seeks to "control the relationship between banks and their Florida customers." Petr. Br. at 21. See *Dexter v. Equitable Life Assurance Soc'y*, 527 F.2d at 235 (rejecting "[t]he argument that the tying of insurance policies to mortgage loans is not 'the business of insurance'" (relying on *Addrisi v. Equitable Life Assurance Soc'y*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975))).

Second, the fact that general statutes may prohibit express, overt tying does not mean the Florida Legislature cannot make an informed judgment that certain lending settings are inherently coercive and should not be available as a venue for insurance sales. As the District Court below recognized,

notwithstanding the existence of specific prohibitions on coercive credit extension, . . . loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-length relationship be maintained among the bank, the loan officer, and the insurance agents.

839 F. Supp. at 842 (emphasis added), Pet. App. 31a. Unlike those other statutes, § 626.988 addresses non-overt coercion and circumstances in which customers "voluntarily" tie because of a belief it will better their credit relationship with the bank. Unlike those other statutes, § 626.988 is prophylactic.

Third, the Florida Legislature's creation of certain exceptions does not undermine its policyholder protection purpose.³¹ The exceptions primarily address insurance sales practices in which banks were already engaged, the discontinuance of which the Legislature believed would pose an unfair hardship. See *Glendale*, 587 So. 2d at 537. As to permitting banks to sell credit-related insurance, by the early 1970s banks were the *only* entities providing credit insurance and the Legislature could conclude it was a legitimate means of protecting banks' loan business. See *id.* As to permitting small-town bank unaffiliated with bank holding companies to sell insurance, the Legislature appeared concerned with "lack of availability of insurance in smaller towns." See *id.* Nothing prohibits the Legislature from considering such competing interests and crafting exceptions when forging its regulatory rules. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303-305 (1976). Indeed, this Court "consistently has recognized that in addressing complex problems a legislature may take one step at a time, 'addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Bowen v. Owens*, 476 U.S. 340, 347 (1986) (quoting *Williamson v. Lee Optical*, 348 U.S. at 488-89); see *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 167 (1973).

³¹ Indeed, the inclusion of such exceptions belies the contention that the general prohibition was enacted exclusively to protect insurance agents. Applying the Petitioner's and the OCC's own logic, if "simple economic protectionism" was the actual purpose, see Petr. Br. at 19, why weren't all banks excluded from selling all forms of insurance?

Petitioner cannot avoid the inevitable conclusion that Fla. Stat. § 626.988 was enacted "for the purpose of regulating the business of insurance." Therefore, it may not be superseded or preempted by a federal Act unless that Act "specifically relates to the business of insurance."

B. Neither Section 92 nor the Act in Which It Is Contained Specifically Relates to the "Business of Insurance."

Every court that has addressed the issue has concluded that Section 92 does not "specifically relate to the business of insurance" within the meaning of McCarran. See *Barnett*, 839 F. Supp. at 841-42, *aff'd*, 43 F.3d at 636-637; *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 36 (E.D. Ky. 1992), *aff'd sub nom. on other grounds, Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), *petition for cert. filed*, 64 U.S.L.W. 3069 (U.S. July 13, 1995) (No. 95-74); *First Advantage Ins. v. Green*, 652 So. 2d 562, 573-74 (La. Ct. App. 1st Cir. 1995).³² As demonstrated below, that conclusion is correct.

In *Fabe*, this Court explained that a state law enacted for the purpose of regulating the business of insurance does not yield to a conflicting federal statute "unless [the] federal statute *specifically requires* otherwise." *Fabe*, 113 S. Ct. at 2211 (emphasis added); see also *Prudential*, 328 U.S. at 429-30 (explaining that federal laws may not displace state laws regulating the business of insurance "except as otherwise expressly provided in the Act itself or in future legislation"). In *Fabe* this Court described this specificity requirement as a "clear-statement rule" of intent to preempt: unless it is *clear* Congress had such

³² Accord Jason M. Koral, Recent Cases, *Bank Holding Companies and "The Business of Insurance": Interpretation of McCarran-Ferguson in Owensboro National Bank v. Stephens and Barnett Bank v. Gallagher*, 19 Harv. J.L. & Pub. Pol'y 217, 219-20 (1996) ("Primarily a banking statute, 12 U.S.C. § 92 is not open to interpretation as a law specifically relating to the business of insurance [It] fails to evince even a shred of intent to trump state insurance licensing authority.").

an intent, McCarran dictates that any conflicting state law enacted for the purpose of regulating the "business of insurance" must survive. 113 S. Ct. at 2211.³³ As explained below, to demonstrate the requisite intent, Congress must either expressly direct displacement of state law or attempt to control directly some aspect of the "business of insurance" the regulation of which is otherwise expressly delegated to the States. Section 92 does neither.

Petitioner and the OCC argue that a federal statute that authorizes a national bank to sell insurance *must* "specifically relate to the business of insurance" if a law that prohibits banks from being licensed to sell insurance regulates that business. See Petr. Br. at 41; OCC Br. at 23. However, this simple equation ignores the different purposes of each provision. As demonstrated below, because Section 626.988 was designed to assist in the selection of an appropriate risk transfer mechanism, it "regulates the business of insurance," whereas Section 92

³³ All available evidence supports the *Fabe* Court's conclusion that Congress intended to create an express intent-to-preempt requirement. Both the House and the Senate versions of the original bill provided that "[n]o act of Congress . . . shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such act specifically so provides." 91 Cong. Rec. 1085 (1945) (quoting the House Judiciary Committee's S. 340, § 2(b), as amended, 79th Cong., 1st Sess. (1945)); 91 Cong. Rec. 488 (1945) (quoting S. 340, § 2(b), 79th Cong., 1st Sess. (1945)). The change from "unless the act specifically so provides" to "unless the Act specifically relates to the business of insurance" was made on the last day of a three-day conference, after the antitrust proviso was appended to the end of Section 2(b). If no amendment to the "specifically so provides" language had been made, the statute would have included the cumbersome clause, ". . . specifically so provides: *Provided, That . . .*" Especially in the absence of any explanatory colloquy or any discussion in the Conference Report, the most obvious explanation is that this amendment was made simply to avoid awkward syntax. There is no evidence the conferees intended a substantive change in meaning. Indeed, in explaining the pre-conference language, Senator Ferguson used the phrases interchangeably. See 91 Cong. Rec. 479 (1945).

does not "specifically relate" to that business because it was not designed to address risk transfer concerns.³⁴

Petitioner and the OCC both argue that Section 92 specifically relates to the business of insurance "because it permits national banks to engage in one aspect of that business." OCC Br. at 21; see Petr. Br. at 42. In making this contention, they disregard the three-pronged inquiry necessitated by McCarran's text: whether (1) an "Act of Congress" (2) "specifically relates" to (3) the "business of insurance." Petitioner and its *amici* appear to argue that any federal law that even mentions the word "insurance" must "relate" to the "business of insurance." In so doing, they not only confuse the "business of insurance" with "insurance," but they also read the qualifier "specifically" out of the statute and ignore this Court's recent pronouncement on the meaning of the word "relates." A proper understanding of the scope of the three-pronged inquiry necessitates the conclusion that Section 92 is *not* an "Act of Congress" that "specifically relates to the business of insurance."

The cornerstone of this inquiry—the "business of insurance"—is a term of art that is decidedly narrower than "insurance" generally. See *National Securities*, 393 U.S. at 459. It encompasses those laws and practices designed to impact the "transferring or spreading" of risk. *Pireno*, 458 U.S. at 129.³⁵ McCarran thus requires an inquiry

³⁴ As the *Fabe* dissent would put it, Fla. Stat. § 626.988 "increase[s] the reliability" of the insurance transaction while Section 92 does not. 113 S. Ct. at 2217 (Kennedy, J., dissenting).

³⁵ This Court has never examined in detail the scope of the "specifically relates" clause. In analyzing the term "business of insurance" in the other two places it appears in Section 2(b), as well as in analyzing that same term in the ERISA context, the Court has utilized the factors identified in *Pireno* and *Royal Drug* to delineate what laws and practices fall with the ambit of that term. See, e.g., *supra* n. 25 (discussing *Fabe's* reliance on *Pireno*); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 743-44 (1985).

into whether Section 92 not only “relates” but “specifically relates” to this business. Only last Term, this Court unanimously cautioned against just the type of broad interpretation of the term “relates” Petitioner advocates, particularly in the context of preemption provisions:

If “relate to” were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere. . . . But that, of course, would be to read Congress’s words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.

Blue Cross, 115 S. Ct. at 1677.

This caution is especially warranted here because the “Act of Congress” at issue must “specifically relate” rather than merely “relate” in order to attain preemptive effect under McCarran. Accordingly, the relationship must be “[p]recisely formulated or restricted; definite; explicit.” *Black’s Law Dictionary* 1398 (6th ed. 1990). Indeed, “the plain meaning of the term ‘specific’ . . . [is] ‘having a real and fixed relationship to [and] restricted by nature to a particular individual, situation, relation, or effect.’” *Lohr v. Medtronic, Inc.*, 56 F.3d 1335, 1346 (11th Cir. 1995) (quoting *Webster’s New International Dictionary* 2187 (3d ed. 1976)). Thus, Section 92 can be construed to preempt state law only if it “relates” to the “business of insurance” with *definiteness, exactness, and precision*.

In attempting to determine whether the state statute at issue in *Blue Cross* merely “related to” employee benefit plans, the Court looked to its earlier interpretations of the word “relates”³⁶—interpretations on which Petitioner and its *amici* rely—and concluded that they were useless even in the ERISA context in which they had been developed:

³⁶ See, e.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

We simply must go beyond the unhelpful text and the frustrating difficulty of defining [“relates to”], and look instead to the *objectives* of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

115 S. Ct. at 1677 (emphasis added). After examining ERISA’s objectives in *Blue Cross*, the Court turned to the “purpose and effect” of the state law at issue to determine whether it satisfied these objectives. *Id.* at 1678. Similarly, this Court should look to “the objectives of” McCarran “as a guide to the scope of the” federal law that Congress “understood would survive” under the “specifically relates” test.

As Petitioner recognizes, McCarran’s objective was to ensure that, in the insurance realm, “the rights of the States to regulate and collect taxes [w]ould not be repealed by implication.” Petr. Br. at 32 (quoting 91 Cong. Rec. 481-82 (1945) (statement of Sen. Radcliffe)). Congress wanted no unintentional displacement of state insurance regulations. Indeed, as Senator Revercomb emphatically stated:

We want the business [of insurance] left in the control of the States, unless by enactment in the future we specifically state that we do not want something they are doing to be continued.

91 Cong. Rec. 485 (1945). And, as the Court has now repeatedly made clear, the realm of the “business of insurance” that Congress sought to protect centers on the transfer or spreading of risks through insurance contracts. That is, Congress intended to preserve for the States the sole authority to regulate the many different facets of that risk-spreading process including, most specifically, the terms of protection of the insured. See, e.g., *Fabe*, 113 S. Ct. at 2208-09; *id.* at 2213-16 (Kennedy, J., dissenting); *Pireno*, 458 U.S. at 127-31.

It is therefore clear that Congress understood that no federal law could be construed to supersede such state

regulations unless the federal law "specifically related" to the transfer or spreading of risk—unless, through the enactment of that federal law, Congress specifically intended to supplant the States' prescription of "the terms of protection of the insured." *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 321 (1943).³⁷

To determine whether Congress had such an intent when it enacted Section 92, the Court must examine the statute's "purpose and effect." *Blue Cross*, 115 S. Ct. at 1678. As both Petitioner and the OCC concede, the "purpose and effect" of Section 92 is far-removed from any of the objectives with which Congress was concerned in McCarran: "[w]e may certainly assume that in authorizing national banks in small towns to sell insurance, Congress's primary purpose was to regulate banking." OCC Br. at 21 (emphasis added); see also Petr. Br. at 45-46. Indeed, no aspect of Section 92, the 1916 Act in which it was enacted, or the Federal Reserve Act of which it was made a part, is designed to impact the transfer or spreading of risk in any way. They do not "specify" any intrusion on any aspect of the "business of insurance" otherwise expressly reserved to the States in McCarran.

The sole "purpose and effect" of Section 92 is to provide corporate power to enable small-town national banks to obtain an additional source of revenue to better compete with state-chartered banks. See 53 Cong. Rec. 11001 (1916). This grant of authority is not something the States could, under any circumstances, accomplish; it is

³⁷ Just as "[a] specific intent crime is one in which the defendant must not only intend the act charged, but also intend to violate the law," *United States v. Birkenstock*, 823 F.2d 1026, 1028 (7th Cir. 1987) (emphasis added), Congress must not only intend to legislate with regard to "insurance," but must also intend to penetrate the state regulation of the "business of insurance"—a realm protected by McCarran—for an enactment to "specifically relate" to that business.

purely a prerogative of Congress. Thus, the mere fact that Congress granted this federal charter authority to small-town national banks in no way evinces an intent—or demonstrates the effect—of treading on the state-regulated area of insurance. Congress exercised its authority in a completely federal sphere. Put differently, it was not "specifying" its impact on, or displacement of, the state-regulated "business of insurance."

"The crucial point is that here [Congress] has focused its attention on [national bank] protection; it is not attempting to secure the interests of those purchasing insurance policies." *National Securities*, 393 U.S. at 460. For this reason, Petitioner's and OCC's contention that a federal statute that authorizes a national bank to sell insurance *must* "specifically relate to the business of insurance" if a law that prohibits licensed agents from affiliating with banks regulates that business, see Petr. Br. at 41; OCC Br. at 23, is incorrect. As demonstrated, the aims of the two provisions are fundamentally different, and that difference dictates that the provision designed to assist in the selection of an appropriate risk transfer mechanism "regulates the business of insurance," while the provision that was not designed to address risk transfer concerns bears no specific relationship to that business.

Petitioner's citation to federal insurance schemes that it asserts "specifically relate to the business of insurance" underscores this distinction. See Petr. Br. at 46. Such schemes directly affect the transfer or spreading of a policyholder's risk by either dictating some of the terms of that transfer or actually creating a new insurance source; Section 92 does neither. In *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *rev'd on rehearing on other grounds*, 862 F.2d 491 (5th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989), for example, the Fifth Circuit found that the Longshore and Harbor Workers' Compensation Act ("LHWCA")—a comprehensive insurance compensation scheme—"specifically relates

to the business of insurance." Not surprisingly, the LHWCA and its implementing regulations contain numerous provisions which dictate specific insurance policy terms. See 33 U.S.C. § 935; see also 20 C.F.R. Part 703. Similarly, the National Service Life Insurance Act of 1940, discussed in *Wissner v. Wissner*, 338 U.S. 655 (1950), established a federal life insurance plan for military personnel, underwritten by the federal government, separate from the private-sector business.³⁸ In stark contrast, the Federal Reserve Act in general, and Section 92 in particular, are "bank laws" that regulate ancillary activities of national banks and other federally insured depository institutions; they in no way direct the manner in which insurance risks are allocated and transferred.

Because the Federal Reserve Act and Section 92 neither dictate displacement of state laws that regulate the "business of insurance" nor specify their relation to that state-controlled business in any way—but rather merely grant federal authority in a realm wholly apart from States' power—they may not be deemed to "specifically require" preemption of such state laws. McCarran thus

³⁸ Cases in which federal courts have determined that federal tax provisions apply to insurance companies because the provisions "specifically relate to the business of insurance" appear to have been decided on the wrong grounds as there is no evidence that such federal tax provisions conflicted with state law requirements in any way. See, e.g., *Petr. Br.* at 46 (citing *Hanover Ins. Co. v. Commissioner*, 598 F.2d 1211 (1st Cir.), cert. denied, 444 U.S. 915 (1979)); cf. *National Securities*, 393 U.S. at 466-68 (federal securities reporting requirements are not in conflict with Arizona law and thus apply to insurance company transactions even though those reporting requirements are not specifically related to the business of insurance).

Any reliance on *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993), also is misplaced because the statute at issue there—ERISA—contains express preemption and savings clause provisions that purport to govern which state laws continue to apply. Thus, unlike in Section 92, Congress specifically dictated how the federal law would interact with state insurance regulations.

mandates that neither the Federal Reserve Act nor Section 92 may be construed to invalidate, impair, supersede, or preempt Section 626.988—a law enacted "for the purpose of regulating the business of insurance."

CONCLUSION

For all of the foregoing reasons, the decision of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

ANN M. KAPPLER *

SCOTT A. SINDER

SAM HIRSCH

JENNER & BLOCK

601 Thirteenth Street, N.W.

Twelfth Floor

Washington, D.C. 20005

(202) 639-6000

* Counsel of Record for
Respondents

Of Counsel:

BRUCE J. ENNIS, JR.

PAUL M. SMITH

DONALD B. VERRILLI, JR.

JENNER & BLOCK

December 8, 1995

23
No. 94-1837

Supreme Court, U.S.
FILED

DEC 28 1995

IN THE
Supreme Court of the United States CLERK
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA,
FLORIDA DEPARTMENT OF INSURANCE,
FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC.,
AND FLORIDA ASSOCIATION OF INSURANCE AGENTS,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

RICHARD E. SWARTLEY
General Counsel
BARNETT BANKS, INC.
50 N. Laura Street
Jacksonville, FL 32202
(904) 791-7505

NATHAN LEWIN
(Counsel of Record)
SCOTT L. NELSON
J. BRADLEY BENNETT
JAMES R. HEAVNER, JR.
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner

(i)

RULE 29.6 STATEMENT

A list of parent companies and wholly owned subsidiaries of the petitioner Barnett Bank of Marion County, N.A., is provided in the petition for writ of certiorari at page ii.

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IN THE
SUPREME COURT OF THE UNITED STATES
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BARNETT BANK OF MARION COUNTY, N.A.,

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Respondents.

On Writ of Certiorari
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for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

I.

THIS CASE INVOLVES ACTUAL CONFLICT BETWEEN
FEDERAL AND STATE LAW

The briefs of both respondents and all five of their *amici* describe this case as one involving possible *pre-emption* of Fla. Stat. Ann. § 626.988 ("Section 626.988") by 12 U.S.C. § 92 ("Section 92"). "Pre-emption" substantially understates the relationship between the federal and state laws. Section 92 *conflicts* with Florida's law barring bank insurance sales.

The respondent Insurance Agents devote 15 pages of their brief (pp. 16-30) to arguing that "under traditional pre-emption analysis" Section 626.988 is not displaced. They discuss various general rules of pre-emption. But they ignore the central point of *conflict*. Federal law specifically authorizes national banks to do what Florida law forbids — sell insurance from small-town branches. The respondents claim there is no inconsistency because federal law merely grants a "power" to national banks and does not confer any "right" upon them (Insurance Agents Br. 26-29). This jurisprudential distinction conflicts with this Court's decisions in *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954), and *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982), which the respondents cannot distinguish.

Both *Franklin Nat'l Bank* and *De la Cuesta* involved far less direct conflict between federal and state law than exists here. The state law in *Franklin Nat'l Bank* did not prohibit national banks from doing what federal law authorized — "to receive time and savings deposits and to pay interest on the same." 347 U.S. at 375. The law only prohibited a national bank from using the word "saving" or "savings" in promoting its business. Nonetheless, this Court held that the federal law was not only "declaratory" of a national bank's right to accept savings deposits, but that it also implicitly gave national banks the right to use the "commonly understood description" of that business in their advertising. This, said the Court, created "a clear conflict between the law of New York and the law of the Federal Government," which the Supremacy Clause resolved in favor of the latter. 347 U.S. at 378-79 (emphasis added).

Here, the dispute is not over the use of a term such as "insurance" in advertising. It is over the substantive right to enter the business of selling insurance. If the New York law in *Franklin Nat'l Bank* had not merely prohibited national banks from using the word "savings" but had prohibited them from accepting savings deposits, the *Franklin Nat'l Bank* case would

parallel this one. Had New York law imposed such a bar, it would, *a fortiori*, have been held to conflict with federal law.

In *De la Cuesta*, the federal statute did not even explicitly address the subject of the allegedly pre-empted state law. Under a general grant of statutory authority, a federal agency had authorized savings-and-loan associations to use loan provisions prohibited by California law. Applying the principle that "state law is nullified to the extent that it actually conflicts with federal law" (458 U.S. at 153), this Court held that if a federal regulation authorizes a contract term that state law forbids, there is "an actual conflict between federal and state law." 458 U.S. at 159 n. 14 (emphasis added).

It is inconsistent with *Franklin Nat'l Bank* and *De la Cuesta* to enforce a state law prohibiting banks from doing what federal law explicitly authorizes. The federal authorization necessarily conflicts with the State's prohibition. See also *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985), which held that a state law restricting a county's spending of federal funds conflicted with a federal law stating that the county "may" expend funds for any purpose.¹

Moreover, the language of Section 92 contradicts the notion that Congress merely conferred a "power" and left the ultimate "right" to sell insurance to the judgment of state authorities. Section 92 says that small-town national banks may

¹ *Lawrence County* also holds that a federal agency charged with implementing a statute is entitled to considerable deference on the question whether the statute conflicts with state law. See 469 U.S. at 261. The Comptroller of the Currency does not administer the McCarran-Ferguson Act, so his views on that law may not be entitled to special deference. But on the question whether Section 92 itself empowers national banks to sell insurance regardless of state law, the Court should defer to the Comptroller's consistent construction. See also *Franklin Nat'l Bank*, *supra*, 347 U.S. at 377.

"act as the agent" for any insurance company "authorized" to issue policies by a State. Congress subjected the "right" of national banks only to "such rules and regulations as may be prescribed by the Comptroller of the Currency." Congress did *not* make a bank's "right" to sell insurance subject to regulation by the "authorities of the State." Section 92 thus requires (1) that the insurance company be authorized by the State, and (2) that the bank be authorized by the Comptroller. The respondents seek to add a level of authorization that Congress deliberately omitted — authorization by state regulators of the national bank's "right" to sell insurance.

Nor is *Massachusetts Medical Soc'y v. Dukakis*, 815 F.2d 790 (1st Cir.), *cert. denied*, 484 U.S. 896 (1987), comparable to this case. Congress did not explicitly authorize doctors to "balance bill," as Congress explicitly authorized national banks to sell insurance in Section 92. Indeed, then-Judge Breyer concluded that Congress evinced at most an intent "to leave existing fee-setting practices undisturbed." 815 F.2d at 794. It is one thing to hold that a federal law that fails to prohibit a practice does not pre-empt a state law's prohibition. It is quite another to argue that a federal law that explicitly authorizes a practice does not conflict with a state law that outlaws the very same practice.

The Insurance Agents' assertion that Section 92 reflects only a policy of "competitive equality" between national and state-chartered banks (Insurance Agents Br. 22), is even farther off the mark. The Insurance Agents rely on *First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969), but that case merely reveals the fallacy of their argument. The question in *Dickinson* was whether a Florida national bank could provide off-premises facilities for making deposits. Florida prohibited state-chartered banks from offering such services. This Court held that the McFadden Act, 12 U.S.C. § 36, which permits national banks to have branch offices *only to the extent state law permits state banks to do so*, barred the bank from offering these services.

The Court ruled that, as a matter of *federal* law, state branching restrictions applied to national banks. The Court stressed that "national banks are 'necessarily subject to the *paramount* authority of the United States.'" 396 U.S. at 134 (emphasis added) (quoting *First Nat'l Bank v. Missouri*, 263 U.S. 640, 656 (1924)). The Court explained that "while Congress has absolute authority over national banks, the federal statute has incorporated by reference the limitations which state law places on branch banking activities by state banks." 396 U.S. at 131. The Court's references to "competitive equality" between national and state banks referred only to the McFadden Act's express provisions ensuring that "neither system ha[s] advantages over the other *in the use of branch banking*." 396 U.S. at 131 (emphasis added); *see also First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

Unlike the McFadden Act, Section 92 does not employ the "mechanism of referring to state law," 396 U.S. at 133, with respect to the extent of national banks' power to sell insurance. The absence of any hint in the statute that the power to sell insurance is subject to state restriction is a telling sign that Congress intended no such limitation. *See Franklin Nat'l Bank*, 347 U.S. at 378 & n.7 ("We find no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances."); *Ramapo Bank v. Camp*, 425 F.2d 333, 344 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970). As Section 92 and the McFadden Act illustrate, when Congress intends to authorize state-law restrictions on national banks, it does so expressly. *See also, e.g., Missouri ex rel. Burnes Nat'l Bank v. Duncan*, 265 U.S. 17 (1924) (Holmes, J.).

Far from supporting respondents, *Dickinson* illustrates *our* point. Absent express recognition by Congress that state law limits national bank powers, state laws that would bar national banks from exercising powers granted by Congress either implicitly (as in *Franklin Nat'l Bank*) or expressly (as

here) conflict with federal law. National banks "are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the [federal] Government may permit." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 559 (1963) (quoting *Van Reed v. People's Nat'l Bank*, 198 U.S. 554 (1905)). When Congress authorizes national banks to enter a line of business, "[m]anifestly this exclude[s] the power of the state in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function" *First Nat'l Bank v. Fellows*, 244 U.S. 416, 425 (1917); accord, *Easton v. Iowa*, 188 U.S. 220, 229-38 (1903); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875). The only question here is whether the McCarran-Ferguson Act reverses the general rule and saves a state law that obviously conflicts with federal law.

II.

INVALIDATING SECTION 626.988 WILL NOT DISRUPT LEGITIMATE STATE REGULATION

In seeking to make this Court believe that the sky will come falling down if the Court rules against them, respondents and their *amici* grossly exaggerate the effect of invalidating Section 626.988. They claim such a ruling will "eradicate well-established state regulation of insurance agents and their activities" (Insurance Agents Br. 13), "undermine the regulatory scheme for insurance agents in Florida and other States" (Nat'l Conf. of State Legislatures Br. 2), and "preempt the licensure of agents by the states" (Council of Insurance Agents Br. 4).

None of these cataclysmic consequences results from invalidation of Section 626.988 on the grounds we urge. If the Court agrees with us and the Sixth Circuit in the *Owensboro* case that a flat ban on insurance sales by banks is not a law enacted "for the purpose of regulating the business of insurance," such a decision will have no effect on *legitimate* and *bona fide* "well-established state regulation of insurance agents." Nor will it hinder legitimate and bona fide "licensure of insurance agents" or any other lawful part of "the regulatory scheme for insurance agents in Florida and other States." The only result of such a ruling will be to prevent the McCarran-Ferguson Act from being used to cloak local laws enacted to exclude competitors at the behest of the insurance-agent lobby.

Indeed, such a holding will legitimate and encourage local laws honestly aimed at preventing deception or coercion of insurance buyers. The Florida law presumes irrebuttably that banks deceive or coerce consumers and that banks must therefore be prevented from selling insurance. Striking down such a law does not affect laws prohibiting deceptive or coercive conduct by *all* insurance agents — whether or not employed by banks. Such laws may qualify for the shield granted by the McCarran-Ferguson Act to state laws enacted "for the purpose of regulating the business of insurance." But that is not the kind of law Florida chose to enact.

By the same token, invalidating Section 626.988 because Section 92 "specifically relates to the business of insurance" does not jeopardize a State's legitimate system of regulating insurance. Such a ruling only bars the State from disqualifying national banks *eo ipso* from selling insurance. Even-handed, across-the-board regulation continues to apply.

The Insurance Agents' contrary assertion rests largely on selective quotation from an interpretive letter of the Office of the Comptroller of the Currency addressing issues not here presented. The Insurance Agents maintain (Insurance Agents

Br. 13) that the Comptroller has opined that States may not require bank employees who sell insurance to be licensed. Their truncated quotation is misleading. The OCC letter says: "Regardless of the form or subject of a regulatory scheme, a state 'cannot demand that a national bank or its employees be licensed to conduct . . . activities allowed by . . . 12 U.S.C. 24(7).'" OCC Interp. Ltr. No. 475 [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,012, at 71,119 (March 22, 1989) (first emphasis in original; second emphasis added). The "activities allowed" by 12 U.S.C. § 24 (Seventh) are those that are at the core of the business of banking. The letter the Insurance Agents quote stands only for the unexceptional proposition that a national bank need not be licensed by a State to carry out its *banking* functions. The letter does not address whether nondiscriminatory license requirements apply to bank employees engaged in insurance sales authorized by Section 92.

The vice of Section 626.988 that the respondents and their *amici* ignore is that instead of regulating pernicious conduct, it singles out "financial institutions" and disqualifies them, regardless of actual conduct, from selling insurance. A decision that such a legislative decision to throw out the baby with the bath-water will not be accepted as bona fide "regulation" of the business of insurance would not affect legitimate local regulation of that business.

III.

THE CONTENT AND PREAMBLE OF SECTION 626.988 SHOW THAT ITS TRUE PURPOSE IS TO SUPPRESS COMPETITION, NOT TO REGULATE INSURANCE

The respondents and their *amici* have imaginatively conceived scenarios in which banks deceive or coerce naive and powerless purchasers of insurance. They have even portrayed

banks as such potentially influential vendors of insurance that they force insurance companies to endanger their own solvency. They ask this Court to believe that these potential harms led the legislature to "regulate the business of insurance" by automatically disqualifying virtually all "financial institutions" from selling insurance.

The short answer is that if Florida's legislature had indeed wanted "to avoid unfair trade practices, coercion, and undue concentration of resources" — as the Florida Insurance Commissioner claims in his brief (pp. 16-26) — it could have enacted or strengthened laws directed at such *conduct*. Section 626.988 is not directed at these alleged evils. Rather, it singles out "financial institutions" and excludes them from the ranks of those who may sell insurance in Florida.

Other Florida laws are directed at the conduct that the respondents cite as justifying the sweeping ban of Section 626.988. *See, e.g.*, Fla. Stat. Ann. §§ 626.9541, 626.7451, 626.7491, 626.88, 628.801. The two Florida insurance officials on whose challenged testimony the respondents rely acknowledged that these general laws would continue to apply to anyone who sells insurance in Florida, including employees of banks, even if Section 626.988 is held invalid. *See* Tr. 48-50, 96. The blanket prohibition applicable to all banks is, therefore, not a necessary or legitimate form of "regulation."

State regulatory regimes that govern how insurance agents interact with policyholders may be protected by the McCarran-Ferguson Act. *Cf. FTC v. National Casualty Co.*, 357 U.S. 560, 564 (1958) (per curiam). But the Florida law at issue here does not address the conduct of agents in soliciting, negotiating, or selling insurance. Section 626.988 does not refer to misrepresentation, false advertising, unfair discrimination, rebating, twisting, illegal dealings in premiums, or any of the other practices that are catalogued in Fla. Stat.

Ann. § 626.9541 — the Florida law that defines unfair or deceptive practices with respect to insurance.

Rather, as the Insurance Agents concede, Section 626.988 controls "affiliation" between insurance agents and banks. See Insurance Agents Br. i. The obvious effect of Section 626.988 is *not* to control the "point of sale" of insurance, but to preclude banks from acquiring revenue from insurance sales by prohibiting them from establishing a business relationship with insurance agents. If anything is clear from this Court's McCarran-Ferguson Act precedents it is that financial arrangements between insurers and third parties are not part of the "business of insurance" as the McCarran-Ferguson Act uses the term. See *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 131-32 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 215-17 (1979).

Respondents rely on an intermediate Florida appellate court's statement that the legislature determined "that there is potential for abuse inherent in financial institutions being involved in the sale of insurance" (*Production Credit Ass'ns v. Department of Ins.*, 356 So.2d 31, 32 (Fla. Dist. Ct. App. 1978)), and on the same court's holding that Section 626.988 is constitutional because "rationally related to legitimate state goals" (*Glendale Fed. Sav. & Loan Ass'n v. Department of Ins.*, 587 So.2d 534, 536 (Fla. Dist. Ct. App. 1991), *review denied*, 599 So.2d 656 (Fla. 1992)). But the finding that Section 626.988 is not unconstitutional does not mean that it regulates the business of insurance under the McCarran-Ferguson Act. And the court's conclusion in *Glendale* that "a legislature could well have decided that *some* protection was required" (587 So.2d at 536; *emphasis added*) does not mean that a total ban on insurance sales by "financial institutions" is a permissible regulation of the business of insurance within the meaning of the Act. *Some* protection could have been provided in many other ways. Excluding banks altogether was patently

prompted by motives other than protection of consumers or regulation of the insurer-policyholder relationship.

The *first* of the reasons stated in the preamble to Section 626.988 when it was introduced in the Florida legislature was (Brief for the Petitioner 6a):

[T]he entry of large banking institutions into the insurance agency business in areas where the banks have a large concentration of resources would result in the demise of small insurance agencies or their transformation into large combinations. This would decrease competition within the insurance industry and reduce the opportunity for youths, veterans and women to gain a foothold in a business in which ultimately they could participate as owners or managers.

The anti-competitive purpose of Section 626.988 could not be stated more succinctly. The legislature was not concerned with "regulating" sellers of insurance to protect the insurance-buying public. It was concerned primarily with "the demise of small insurance agencies" and fears of reduced "opportunity" for individuals as insurance agents. That is not the kind of legislation that the McCarran-Ferguson Act protects.

This Court's decision in *Michael M. v. Superior Court*, 450 U.S. 464 (1981), on which the respondents and their *amici* rely heavily (Insurance Agents Br. 36, Stephens Br. 9, n.9; Nat'l Conf. of State Leg. Br. 9, n.5), does not require this Court to accept the after-the-fact justification for Section 626.988 proffered by the respondents. The plurality in *Michael M.* recognized that in determining the constitutionality of a law, "the search for the 'actual' or 'primary' purpose of a statute is likely to be elusive" (450 U.S. at 469-70). In exercising the sensitive power to invalidate state statutes, the plurality gave "great deference" to a statutory justification offered by a State

and accepted by its highest court (450 U.S. at 470). Such deference is not required when the issue is a statutory one — whether a local law should be shielded from pre-emption because a federal statute protects local laws having a defined "purpose." In that distinguishable context, a court has a statutory obligation to determine the true purpose of the local law and not to defer to improbable explanations that a State may propose in order to save its laws from pre-emption. In any event, *Michael M.* does not remotely authorize respondents' request that the Court rely on *post hoc* testimony asserting hidden purposes to protect the rights of potential policyholders.

Nor are these newly discovered "purposes" valid. Respondents suggest two aims of the Florida statute: *First*, the law allegedly protects insurer solvency by preventing banks from becoming "super agents" who would force independent agents out of business, gain control over the insurance industry, and pressure insurers to make bad underwriting decisions that would lead to financial ruin. *Second*, respondents contend that Section 626.988 prevents banks from unlawfully forcing bank customers to meet their insurance needs through bank-affiliated rather than independent agents. Respondents say these "purposes" show that Section 626.988 has the "end, intention or aim" of protecting policyholders. Respondents err.

There is no indication in the law's history that Section 626.988 was enacted to protect policyholders at all. The only "evidence" offered at trial was the testimony of the Insurance Department's own lawyers about what they believed to be the law's purposes. The use of such testimony has been "compellingly criticized," particularly when "generated in the course of litigation . . . , for it may be designed to mislead, to put an advocate's slant on things." *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1438-39 (7th Cir. 1988); cf. *Quern v. Mandley*, 436 U.S. 725, 736 n. 10 (1978). The language and legislative history of Section 626.988 do not mention insurance-

company solvency, reliability of policies, or the desire to protect policyholders. See Brief for the Petitioner 5a-10a.

The fourth of six legislative concerns mentioned in the preamble to Section 626.988 was the possibility that banks might "tie" loans to the borrower's purchase of insurance. This concern is not with the insurer-policyholder relationship, but the relationship between banks and their customers. Moreover, the legislature's purported concern does not, as the Insurance Agents contend, reflect a determination by the Florida legislature that banks "will induce Florida residents to purchase insurance from the bank that is not needed by or suited to the customer." Insurance Agents Br. 39.² Indeed, given the legislature's expressed desire to protect independent agents from competition, it is far more likely that the statement about "voluntary tying" indicates the legislature's concern that bank customers would fill their insurance needs by using bank-affiliated agents instead of independent insurance agents. See Stephens Br. at 13. The desire to protect independent insurance agents from bank competition is not a concern protected by the McCarran-Ferguson Act.

Florida's Insurance Commissioner has "lodged" with the Court a recommended order in an administrative proceeding titled *Department of Ins. v. James Mitchell & Co.* The determinations of the hearing officer in that case are irrelevant to any issue before the Court. That matter concerns allegations that variable annuities were misrepresented to be "bank products." Annuity sales are not governed by Section 626.988, and we do not understand the respondents to contend that a

² Respondents profess concern that banks might sell insurance that customers do not need because banks are motivated by "profit." Insurance Agents Br. 39-40; Insurance Comm'r Br. 32. Is one to presume that insurance agents sell insurance only for eleemosynary reasons and never suggest the purchase of unneeded insurance?

purpose of Section 626.988 is to prevent policyholders from being deceived into thinking that life, fire, or other insurance policies, issued by a licensed insurance company, are "bank products." The allegations of misconduct in the *James Mitchell* case shed no light on the purposes of Section 626.988. Indeed, the trial court determined that the allegations in the *James Mitchell* matter were inadmissible for just this reason. See Tr. at 59-62, 83-89). We are surprised that the Department has placed this inadmissible and irrelevant material before this Court. It betrays the desperation of the respondents.

IV.

THE FLORIDA STATUTE IS NOT A CONVENTIONAL LICENSING OR REGULATORY MEASURE

The Insurance Agents contend that Section 626.988 is an insurance "licensing law," and they suggest that all such laws fall within the scope of the McCarran-Ferguson Act. See Insurance Agents Br. 32-38. The Insurance Agents fail to recognize the crucial distinction between licensing schemes designed to protect policyholders and laws like Section 626.988 that serve other purposes.

State licensing laws that aim to protect policyholders by enforcing professional standards of conduct for insurance agents may be protected by the McCarran-Ferguson Act. Cf. *Robertson v. California*, 328 U.S. 440 (1946). But laws that withhold, suspend or revoke licenses for reasons unrelated to the reliability or performance of the contract of insurance are not enacted for the purpose of regulating the business of insurance. Cf. *SEC v. National Sec., Inc.*, 393 U.S. 453, 458-60 (1969). The mere fact that Section 626.988 uses the State's licensing mechanism to prohibit banks selling insurance agents does not make it regulation of the business of insurance.

Section 626.988 is not like any of the "licensing laws" cited by the Insurance Agents and their *amici*. Licensing laws that monitor agents' education, competence, and trustworthiness, as well as the reliability of the contracts of insurance that they sell, may be said to protect policyholders. See Insurance Agents Br. 33, n. 24; Council of Ins. Agents and Brokers Br. 6; Stephens Br. 21-22; see also *Robertson v. California*, *supra*, 328 U.S. 449 (rejecting a Commerce Clause challenge to California's agent licensing system because it was "designed appropriately to secure the public from those evils of uncontrolled insurance solicitation to which it is directed"). Florida has enacted an entire system of such regulations, establishing procedures and requirements for the licensing of agents. See Fla. Stat. Ann. §§ 626.011 - 626.726.

Section 626.988, by contrast, does not prevent "uncontrolled insurance solicitation." It does not prevent banks from selling "worthless" policies to unsuspecting customers. Unlike other provisions of Florida law, it does not require minimal skills and education, or disqualify agents on the basis of character. It does not qualify as a "licensing" law in any traditional sense of the term, and it certainly bears no resemblance to the laws that this Court read in *National Securities* and *Fabe* as regulating the business of insurance.

Finally, standard authorities on insurance do not include total disqualification of banks from selling insurance as a customary form of "regulation." In Keeton & Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* §§ 8.2(a), 8.2(b), at 938-41 (1988), the usual goals of insurance regulation are described, together with the forms insurance regulation ordinarily takes. Although the treatise — quoted extensively by the National Conference of State Legislatures at pp. 13-14 of their brief — describes "tie-in transactions" as a "troublesome area," it does not suggest that exclusion of banks from selling insurance is a permissible form of "regulation." See *id.* at 941.

Nor do the cases cited by the Insurance Agents establish that blanket prohibitions are "regulation" under the McCarran-Ferguson Act. *See* Insurance Agents Br. 38. Those authorities hold that prohibitory police-power legislation is not constitutionally forbidden. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726 (1963). They by no means suggest that such prohibitions are "regulation" within the meaning of the McCarran-Ferguson Act. *Cf. Robertson, supra*, 328 U.S. at 449 (distinguishing "regulatory" from "exclusory" legislation).

V.

BECAUSE SECTION 92 EXPLICITLY REFERS TO INSURANCE SALES, IT "SPECIFICALLY" RELATES TO THE BUSINESS OF INSURANCE

The respondents and their *amici* acknowledge — as they must — that Section 92 "relates" to insurance. They argue, however, that it does not do so *specifically*. "Specifically," they claim, means a federal law must "either expressly direct displacement of state law or control directly some aspect of the 'business of insurance' the regulation of which is otherwise expressly delegated to the States." Insurance Agents Br. 42. *See also* Insurance Comm'r Br. 37 ("the federal law must 'specifically relate' with enough preemptive horsepower to displace the state law").

But the word "specifically" has a much clearer and more definite meaning. It means that the federal law must *explicitly* refer to the business of insurance, not just include insurance in some more general statutory term. *Black's Law Dictionary* (6th ed. 1990), for example, defines "specifically" as follows: "In a specific manner; explicitly, particularly, definitely." *Webster's Third New International Dictionary (Unabridged)* (1971) offers "explicit" as a synonym for

"specific" and defines "specific" as, *inter alia*, "characterized by precise formulation or accurate restriction (as in stating, describing, defining, reserving): free from such ambiguity as results from a careless lack of precision or from omission of pertinent matter."

If Section 92 only gave small-town national banks general authority to engage in "commercial services" and the issue was whether the statute "specifically related" to insurance because the sale of insurance was included within the term "commercial services," the modifier "specifically" might dictate a negative answer. But if the federal law explicitly and definitely specifies "insurance" as its subject matter — as Section 92 does *five* times — it is plainly a law that "*specifically* relates to the business of insurance."

Respondents' attempts to evade the statutory language are inventive but vain. Citing *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), respondents argue that to preempt state law under the McCarran-Ferguson Act, a federal statute must not merely "specifically relate" to the business of insurance, but must specifically *state* that pre-emption is intended. *Fabe*, of course, holds no such thing. The meaning of "specifically relates" in the McCarran-Ferguson Act was not even at issue in *Fabe*. The language on which respondents pin their hopes — *i.e.*, the Court's statement that the McCarran-Ferguson Act creates "what is, in effect, a clear-statement rule" under which there is no pre-emption "unless a federal statute specifically requires otherwise" (113 S. Ct. at 2211) — is simply a generalized description of the effect of the Act, not an attempt to prescribe a legal standard (let alone a legal standard that disregards the clear language of the Act). We do not take issue with the Court's language in *Fabe*. We merely point out that under the Act, pre-emption is "specifically required" (to use *Fabe's* terms) when a federal law "specifically relates to the business of insurance" (to use the terms of the Act). No express statement of pre-emptive intent is required.

Any other reading would do violence to the words of the statute, and would, in effect, revive different language that was proposed but ultimately not enacted. See Brief for the Petitioner 44-45. The Insurance Agents suggest that the statute be read as if the proposed language (under which state law would yield to a federal statute only if the federal law "specifically so provides") had been enacted. Insurance Agents Br. 42, n.33. The reason offered for this unorthodox approach is the speculation that the original language was rejected because of its awkward syntax.³ Respondents offer no support for the novel proposition that obvious substantive differences between proposed and enacted statutory language should be overlooked whenever the original language was "cumbersome." The use of awkward phrases in statutory drafting is so ubiquitous that respondents' proposed canon would leave the meaning of few laws unaltered.

Respondents also argue that a law may specifically relate to only one subject. Insurance Comm'r Br. 45. They therefore assert that Section 92, which they say relates to "bank income," cannot relate to insurance. Respondents support their dubious premise with neither precedent nor logic. Statutes, like other writings, may specifically relate to any number of subjects. This Court's own rulings demonstrate the fallacy of respondents' reasoning. ERISA, which the Court described as a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employment benefit plans" in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983), was also held to "specifically relate" to the business of insurance in

³ The supposed "awkwardness" the Insurance Agents believe Congress was striving to avoid was the placement of a phrase beginning with "Provided" immediately after a semicolon following the word "provides." Such constructions appear elsewhere in the United States Code (e.g., 16 U.S.C. § 590y; 26 U.S.C. § 420(c)(3)(A)). There is no reason to suppose Congress would have been averse to using such language had it captured Congress' intent.

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517 (1993).

In a similar vein, respondents claim Section 92 does not "specifically relate" to the business of insurance because it was enacted "for the purpose of regulating" banks, not insurance. No doubt Section 92 (like Section 626.988) regulates banks. But the second prong of the McCarran-Ferguson test, unlike the first, does not turn on whether a statute was "enacted for the purpose of regulating the business of insurance." The federal law's "purpose" is not the issue. The law need only "relate" to the business of insurance, and do so "specifically." Section 92 passes that test regardless of whether its purpose is said to be regulation of banks, regulation of insurance sales, regulation of insurance sales by banks, or anything else.

Finally, respondents point out that the McCarran-Ferguson Act requires that the federal law specifically relate not just to "insurance," but to the "business of insurance." They correctly observe that there is a difference. And they argue that a federal law may mention "insurance" but still not relate to the "business of insurance." These truisms get respondents nowhere. Respondents themselves argue that Florida's law preventing banks from selling insurance regulates the "business of insurance" because the "point of sale" is an essential part of that business. If respondents are wrong on this point, they lose the case because the Florida law is not "enacted for the purpose of regulating the business of insurance." If they are right, they lose anyway, because a federal law that explicitly authorizes national banks to participate at the "point of sale" of insurance must, by respondents' own reasoning, relate (and relate specifically) not just to "insurance," but to the "business of insurance." Respondents have no way out of this dilemma.

CONCLUSION

For the foregoing reasons and those in our principal brief, the Court should reverse the judgment of the court of appeals and remand for entry of final declaratory and injunctive relief in favor of Barnett Bank on the question whether 12 U.S.C. § 92 pre-empts Fla. Stat. Ann. § 626.988.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
SCOTT L. NELSON
J. BRADLEY BENNETT
JAMES R. HEAVNER, JR.
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

RICHARD E. SWARTLEY
General Counsel
BARNETT BANKS, INC.
50 N. Laura Street
Jacksonville, FL 32202
(904) 791-7505

December 1995

Attorneys for Petitioner

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(11)
No. 94-1837

In the Supreme Court of the United States

OCTOBER TERM, 1995

**BARNETT BANK OF MARION COUNTY, N.A.,
PETITIONER**

v.

**TOM GALLAGHER,
FLORIDA INSURANCE COMMISSIONER, ET AL.**

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**BRIEF FOR THE UNITED STATES AND THE
COMPTROLLER OF THE CURRENCY AS AMICI
CURIAE SUPPORTING PETITIONER**

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

EDWARD C. DUMONT
*Assistant to the Solicitor
General*

**ANTHONY J. STEINMEYER
JACOB M. LEWIS**
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

JULIE L. WILLIAMS
Chief Counsel

**L. ROBERT GRIFFIN
ERNEST C. BARRETT, III
JOAN M. BERNOTT**
*Attorneys
Office of the Comptroller
of the Currency
Washington, D.C. 20219*

BEST AVAILABLE COPY

89/12

QUESTION PRESENTED

Whether 12 U.S.C. 92, which provides that national banks in places with no more than 5,000 inhabitants may act as insurance agents, preempts a state law that prohibits most such banks from engaging in most insurance agency activities.

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**BRIEF FOR THE UNITED STATES
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**INTEREST OF THE UNITED STATES AND
THE COMPTROLLER OF THE CURRENCY**

The Comptroller of the Currency is the primary regulator of banks chartered under the National Bank Act, 12 U.S.C. 21 *et seq.* See *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995). The Comptroller accordingly has an interest in assuring that national banks are able to exercise, subject to his supervision, the powers granted to them by Congress, including the power to engage in insurance agency activities set out in 12 U.S.C. 92. The United States also has an interest in

the proper interpretation of the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, on which the court of appeals relied in holding that Section 92 does not preempt the state law at issue here. The Comptroller participated as an amicus curiae before the court of appeals in this case, and the United States is an intervening party in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), petition for cert. pending, No. 95-74, which held that Section 92 preempts a Kentucky statute similar to the Florida statute at issue in this case. The United States and the Comptroller filed a brief as amici curiae in support of the petition in this case.

STATEMENT

1. Petitioner Barnett Bank of Marion County, N.A., is a national bank with a branch in Belleview, Florida, a town with fewer than 5,000 inhabitants. Petitioner is a wholly owned subsidiary of Barnett Banks, Inc., a Florida bank holding company. Pet. App. 20a; see also Pet. ii.

In October, 1993, petitioner purchased the assets and business of Linda Clifford Insurance, Inc. (LCI), an insurance agency also located and doing business in Belleview. LCI's employees, including Clifford, became employees of petitioner. Pet. App. 20a. Four days after the purchase, respondent Gallagher, the state Insurance Commissioner, ordered Clifford and LCI to cease and desist from engaging in any "insurance agency activity" other than sales of credit life or credit disability insurance. *Id.* at 19a.

Respondent's order relied on Fla. Stat. Ann. § 626.988 (West 1984 & Supp. 1995) (*reprinted at* Pet. 4-5), which generally prohibits an otherwise licensed insurance agent from engaging in "insurance agency

activities" if he or she is associated in any way with a "financial institution." Under the statute, "insurance agency activities" include the sale or servicing of insurance policies other than credit life or credit disability policies, and the term "financial institution" includes (among other things) most banks and bank holding companies, including petitioner. Fla. Stat. Ann. § 626.988(1)(a) and (b) (West 1984 & Supp. 1995). However, the definition of "financial institution" excludes any bank "which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000." *Id.* § 626.988(1)(a).¹ Thus, in the case of small towns, the state prohibition applies only to banks that are, like petitioner, affiliated with bank holding companies; independent banks in such places are not forbidden to act as insurance agents.

2. Petitioner sued respondents Gallagher and the Florida Department of Insurance for declaratory and injunctive relief, contending that federal law preempts application of Section 626.988 to prohibit petitioner's operation of LCI. Petitioner relied on Section 13, para. 11, of the Federal Reserve Act, 12 U.S.C. 92, which provides that any national bank located and doing business in a place with no more than 5,000 inhabitants may, under supervision by the Comptroller, "act as the agent for any fire, life, or

¹ The definition also excludes any bank holding company exempted from regulation by the Federal Reserve Board under Section 4(d) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(d) (relating to companies that have held a small bank since before July 1, 1968). Neither exclusion applies to petitioner.

other insurance company" that is authorized to do business in that State. See Pet. App. 18a.²

The district court denied petitioner's request for relief. Pet. App. 17a-36a. The court recognized that Section 626.988 was inconsistent with Section 92. Pet. App. 23a-24a. However, the court accepted respondents' argument that Section 626.988 was saved from preemption by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). See Pet. App. 25a-35a. That Act provides that federal law will not preempt a state statute "enacted * * * for the purpose of regulating the business of insurance," unless the federal law "specifically relates to the business of insurance." 15 U.S.C. 1012(b). The district court concluded that Section 626.988 was enacted "for the purpose of regulating the business of insurance." Pet. App. 26a-32a. The court then held that Section 92 does not "specifically relate[] to the business of insurance," and otherwise "fails to manifest any express intent to preempt state insurance laws." Pet. App. 32a-35a. The court accordingly sustained the State's application of Section 626.988 to prevent petitioner from operating LCI.

3. The court of appeals affirmed. Pet. App. 1a-16a. The court first held that it had jurisdiction to decide petitioner's claim. *Id.* at 5a-6a. The court then examined Florida law (*id.* at 8a-13a), and concluded that the aim of Section 626.988 is to protect insurance policyholders by preventing "the loss of arm[]"s-

² Respondent Gallagher, joined by several associations of Florida insurance agents, counterclaimed for a judgment declaring that petitioner was acting beyond any insurance agency authority conferred by Section 92. See Pet. App. 3a, 19a. Neither court below considered or passed on that issue. See *id.* at 3a, 36a.

length transactions and objectivity" that might occur when "[a] bank becomes involved with insurer and insured." Pet. App. 12a. The court therefore agreed that Section 626.988 "regulates the business of insurance" for purposes of the McCarran-Ferguson Act.

Turning to 12 U.S.C. 92, the court concluded (Pet. App. 13a-15a) that the history of that Section, and its relationship to the National Bank Act and the Federal Reserve Act, indicated that in enacting it "Congress was concerned with banking, not insurance." *Id.* at 15a. For that reason, the court agreed with the district court's determination that Section 92 neither "specifically relates to the business of insurance" nor otherwise "specifically requires" the preemption of conflicting state laws. Pet. App. 15a (quoting 15 U.S.C. 1012(b) and *United States Dep't of the Treasury v. Fabe*, 113 S. Ct. 2202, 2211 (1993)).

SUMMARY OF ARGUMENT

As applied to petitioner in this case, Florida's prohibition on insurance agency activities by bank affiliates conflicts with 12 U.S.C. 92's authorization of such activities by certain national banks. The court of appeals erred in concluding that the McCarran-Ferguson Act, 15 U.S.C. 1012(b), saves the state law from preemption. That Act prevents preemption only if two conditions are met: the state law must have been "enacted * * * for the purpose of regulating the business of insurance," and the conflicting federal law must not "specifically relate" to that business. Neither condition is satisfied in this case.

1. Fla. Stat. Ann. § 626.988 (West 1984 & Supp. 1995) was not enacted for the purpose of regulating

the business of insurance. The state law does not specify generally applicable standards or practices for insurance companies or agents, or regulate either the transfer or spreading of risk, or any other practice that is an integral part of the policy relationship between insurer and insured. Instead, it simply prohibits most financial institutions from acting as agents for the sale of most forms of insurance. The practical effect of Section 626.988 indicates that, in enacting it, the State was more concerned with restricting the activities of banks and their affiliates than with regulating the conduct of the business of insurance.

The insurance-regulation motivations suggested for the State's prohibition on bank-affiliated agencies are implausible. That prohibition may be upheld only if it meets the requirements of 15 U.S.C. 1012(b), which specifically mandates a practical and realistic inquiry into the State's "purpose" in enacting it. Such an appraisal indicates that Section 626.988 does not meet the first requirement for protection under Section 1012(b). If the State was concerned with banks' adopting coercive lending practices, or otherwise taking advantage of their banking customers, in connection with agency sales of insurance, then the provision seems best characterized as an attempt to regulate the business of banking, not the business of insurance. If, on the other hand, the State's prohibition was intended to protect other insurance agents from having to compete against agents affiliated with banks, then it was not aimed at protecting the relationship between insurers and their insureds. In either case, the state law was not "enacted * * * for the purpose of regulating the business of insurance." 15 U.S.C. 1012(b).

2. Whether or not Section 626.988 satisfies the first condition for protection under the McCarran-Ferguson Act, 12 U.S.C. 92 "specifically relates to the business of insurance" within the meaning of that Act. The "specifically relates" standard applicable to the federal law is, as a matter of statutory language, considerably broader than the requirement that a state law have been enacted "for the purpose of regulating" the insurance business. Section 92 meets the "specifically relates" standard, because it authorizes certain banks to participate in the insurance business.

The court of appeals' arguments to the contrary are not persuasive. The court incorrectly focused on whether, in enacting Section 92, Congress was "concerned with banking," rather than on whether the federal provision relates to the business of insurance. The court's reliance on the fact that Section 92 was enacted at a time when Congress was thought to lack power to regulate the insurance business is also misplaced, because there can be little question that Congress always correctly understood that it had the power to authorize national banks to engage in that business on the same terms as others. And the court failed to recognize that 15 U.S.C. 1012(b) requires only that a federal provision "specifically relate[]" to the insurance business, not that it expressly state its intent to preempt state law.

Finally, respondents cannot have it both ways. If Section 626.988 was enacted by the State for the "purpose" of regulating the business of insurance because it limits the ability of some financial institutions to sell insurance, then 12 U.S.C. 92 must certainly "specifically relate[]" to the business of insurance by authorizing national banks to engage in

precisely the same activities. The court of appeals has chosen an interpretation of the two McCarran-Ferguson conditions that is internally inconsistent. Because that is the only interpretation on which respondents could prevail in this case, the judgment below should be reversed.

ARGUMENT

Section 13, para. 11, of the Federal Reserve Act, 12 U.S.C. 92, provides in relevant part that national banks

located and doing business in any place the population of which does not exceed five thousand inhabitants * * * may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent.

Fla. Stat. Ann. § 626.988 (West Supp. 1995), on the other hand, prohibits any insurance agent associated with a bank that is owned by a holding company from selling "any policy or contract of insurance other than credit life insurance or credit disability insurance."

Both courts below acknowledged (see Ret. App. 3a, 8a, 23a-24a) that the state and federal laws are in irreconcilable conflict. Under 12 U.S.C. 92, any

national bank located in a place with 5,000 or fewer inhabitants "may" act as an agent for "any fire, life or other insurance company." Under Section 626.988(1)(a), however, such a bank may not undertake the same activities (other than sales of credit life or credit disability insurance) unless it is "not a subsidiary or affiliate of a bank holding company." Florida's restriction thus stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in authorizing certain national banks to act as insurance agents. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Under normal principles of federal supremacy, the state prohibition must give way to the explicit federal authorization. See, e.g., *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-156 (1982); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994).

The question in this case is whether those principles of preemption are superseded, in this instance, by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). See *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2211 (1993). That Act provides that a federal law should not be held to preempt "any law enacted by any State for the purpose of regulating the business of insurance," unless the federal law "specifically relates to the business of insurance." 15 U.S.C. 1012(b). In applying the Act in this case, the court of appeals held that Section 626.988 was "enacted * * * for the purpose of regulating the business of insurance," and that Section 92 does not "specifically relate[] to the business of insurance." The court erred on both counts.

I. SECTION 626.988 WAS NOT ENACTED "FOR THE PURPOSE OF REGULATING THE BUSINESS OF INSURANCE"

1. This Court has held that state laws are enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act if they "possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Fabe*, 113 S. Ct. at 2210. Section 626.988, however, does not affect how the insurance business is conducted in Florida. It imposes no standard, and requires or forbids no practice, related to the substance of that business. It regulates neither the "transferring or spreading [of] a policyholder's risk," nor any other practice that is "an integral part of the policy relationship between the insurer and the insured." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982); see also *Fabe*, 113 S. Ct. at 2209; *id.* at 2213-2216 (Kennedy, J., dissenting).

Section 626.988 instead regulates the conduct of "financial institutions," including certain national banks, by generally prohibiting them from acting as or affiliating with insurance agents. That prohibition applies even if a bank complies with all of the State's generally applicable rules and regulations governing the conduct of insurance agents or the insurance business. In this case, for example, Linda Clifford was State-licensed, active, and in good standing as a "life, health and general lines insurance agent." Pet. App. 20a. The day after petitioner acquired her agency, however, Clifford automatically lost her ability under Florida law to act as an agent in the sale of anything other than credit life or credit disability insurance—even if all her customers, and all the

insurers that underwrote the policies she sold them, remained unchanged.

The McCarran-Ferguson Act "focus[es] * * * upon the relationship between the insurance company and the policyholder." *Fabe*, 113 S. Ct. at 2208, citing *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969) ("The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.'"). The practical operation of Section 626.988, on the other hand, indicates that, in enacting it, the State was concerned with restricting the activities of banks and their affiliates, rather than with regulating the conduct of the business of insurance. The relationship proscribed in this case, between an otherwise qualified insurance agent and a bank, "has no integral connection to the relationship between the insured and insurer." *United Services Auto. Ass'n v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987).

In this connection, it is important to note that, with respect to banks located in places with fewer than 5,000 inhabitants—that is, with respect to essentially the same banks that 12 U.S.C. 92 authorizes to act as insurance agents—Section 626.988 applies only to a bank that, like petitioner, is "a subsidiary or affiliate of a bank holding company." § 626.988(1)(a). That limitation emphasizes the fact that the state proscription does not focus on the relationship between the insurer and insured, but on restricting the activities of banks affiliated with bank holding companies (as distinguished from banks that are independently owned). State regulation of that kind is remote from the concerns of the McCarran-Ferguson

Act. In that respect, this case is much like *National Securities*, in which this Court held that a law requiring the state insurance commissioner to certify that an insurance company merger was not inequitable to stockholders fell outside the protection of the Act. The Court there emphasized that the State was "not attempting to secure the interests of those purchasing insurance policies," but rather had "focused its attention on stockholder protection." *National Securities*, 393 U.S. at 460; see also *Pireno*, 458 U.S. at 132 (insurer's use of advisory peer review committee was "a matter of indifference to the policyholder," and not part of the "business of insurance"); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 213-214 (1979) (insurer's own contracts with pharmacies to provide benefits to policyholders were not part of insurance business); *Fabe*, 113 S. Ct. at 2208-2209 (discussing prior cases).

2. We do not dispute that "[t]he selling * * * of policies * * * and the licensing of * * * agents" can be part of the "business of insurance." See *National Securities*, 393 U.S. at 460. Many state sales and licensing regulations may indeed be "enacted * * * for the purpose of regulating" that business within the meaning of 15 U.S.C. 1012(b).

Generally applicable education, experience, or financial responsibility requirements for obtaining an insurance agency license would, for example, presumably meet that standard. The government has never argued that Section 92 would preempt the application of such reasonable and generally applicable regulations, so long as they are neither designed nor applied differentially to exclude national banks from undertaking insurance activities authorized by federal law. Cf. *Davis v. Elmira Sav. Bank*, 161 U.S.

275, 290 (1896) (national banks' activities are subject to the operation of "general and undiscriminating state laws" that "do not conflict with the letter or the general objects and purposes of Congressional legislation."). McCarran-Ferguson's protection would also presumably extend to reasonable categorical exclusions relevant to the protection of present or potential policyholders, such as rules prohibiting the operation of insurance agencies by convicted felons or by persons previously found to have committed fraud. The prohibition at issue in this case, however, is of a different sort.

The court of appeals held that Section 626.988 "regulates the business of insurance because it protects policyholders." Pet. App. 13a. It based that conclusion on the ground that the state law safeguards "the financial stability of insurance companies" by preventing improper "pressures" that "could force an insurer to assume a bad risk to quickly consummate a bank loan, or could push a bank customer to take out unnecessary insurance where the bank's only motive is profit." *Id.* at 12a. Those are implausible motivations for prohibiting insurance agents from affiliating with banks owned by bank holding companies.

It is not clear how a bank-affiliated agency could "force an insurer to assume a bad risk to quickly consummate a bank loan." Pet. App. 12a. Insurance underwriters always retain the discretion to decide which risks to insure, regardless of the wishes of their agents. The only situation we can imagine in which a bank-affiliated agency might be in a position "force" the acceptance of a bad risk would be if the loan to be "quickly consummate[d]" were a loan to the underwriter itself. That "risk" would seem to depend on two assumptions. First, the insurance company

would have to be so eager to obtain a particular bank loan that it would consider compromising its underwriting standards—which are, no doubt, themselves closely regulated by state authorities—in order to do so. Second, the bank would have to choose to take advantage of that situation by illegally “tying” a loan to the insurance company’s provision of insurance to the bank’s customers, rather than simply by charging a higher rate or fee for the loan.³ Both assumptions seem quite likely.

The risk that a bank-affiliated agent might “push a bank customer to take out unnecessary insurance where the bank’s only motive is profit” (Pet. App. 12a) is somewhat more realistic. That risk poses no threat to “the financial stability of insurance companies,” however, which presumably could only be *enhanced* by sales of “unnecessary” insurance. Overly zealous sales practices might be thought to threaten harm to potential insurance buyers, but that threat bears little connection to whether or not a particular agent is affiliated with a bank. All insurance agents have a profit motive for selling policies to customers, so the argument must again relate to the possibility of “tying” the sale of a policy to the approval of a bank loan (this time to the potential insurance buyer), or to some other possible abuse of the bank’s relationship with its banking customers. But both state and federal law separately prohibit such tying. See Fla. Stat. Ann. § 626.9551 (West 1984); 12 U.S.C. 1972. Moreover, Section 626.988 not only allows small-town banks not affiliated with a holding company, as well as

³ Federal law prohibits national banks from typing the extension of credit to the purchase or provision of any other product or service. 12 U.S.C. 1972.

certain bank holding companies, to act as agents for all forms of insurance, it also allows all banks to sell credit life and credit disability insurance—which could be closely linked with the bank’s consumer loans, and which would therefore seem to be the most likely candidates for illegal “tying” schemes. Fla. Stat. Ann. § 626.988(1)(a) and (b) (West 1984 & Supp. 1995). Those exemptions are inexplicable if, as the court below posited (Pet. App. 12a), the state prohibition was intended to protect consumers from particular dangers inherent in the sale of insurance by banks.

We do not mean to suggest that the legislative goals suggested by the court of appeals are so insubstantial that the state law is not a rational exercise of the State’s general legislative powers. If challenged under the Fourteenth Amendment, a State’s economic and commercial regulations are presumed to be valid; any inquiry into the legislature’s “actual” purposes is generally inappropriate, and the question is only whether “there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Heller v. Doe*, 113 S. Ct. 2637, 2642-2643 (1993), quoting *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993). As the court of appeals pointed out (Pet. App. 11a-12a), two state appellate decisions have held that Section 626.988 meets that standard, based on possible legislative purposes much like those posited by the court in this case. *Glendale Fed. Sav. & Loan Ass’n v. State*, 587 So. 2d 534, 536-537 & n.1 (Dist. Ct. App. 1991), review denied, 599 So. 2d 656 (Fla. 1992); *Production Credit Ass’n v. Department of Insurance*, 356 So. 2d 31 (Fla. Dist. Ct. App. 1978).

This case involves quite a different challenge. The state law in question, as applied to petitioner, conflicts directly with a federal law. Its application to petitioner may therefore be upheld only if the law meets the special requirements of the McCarran-Ferguson Act, which specifically mandates an inquiry into the State's actual "purpose" in enacting it. 15 U.S.C. 1012(b); see *Fabe*, 113 S. Ct. at 2209-2210 & n.6 (emphasizing "purpose" requirement). That inquiry is practical and realistic, not purely conjectural. Cf. *National Securities*, 393 U.S. at 457, 460 (focusing on State's actual purpose in enacting law restricting insurance company mergers).

Such an appraisal of Section 626.988 indicates that it does not meet the first requirement for protection under Section 1012(b). If the State's concern was with banks' adopting coercive lending practices or otherwise taking advantage of their customers, then Section 626.988 is best characterized as an attempt to regulate the business of *banking*, not the business of insurance. See *FTC v. Dixie Finance Co.*, 695 F.2d 926, 930 (5th Cir.) (App. A) (tying), cert. denied, 461 U.S. 928 (1983); *Elliott v. ITT Corp.*, 764 F. Supp. 102, 105 (N.D. Ill. 1991). If, on the other hand (as seems most likely), Section 626.988 was intended to protect insurance agents from having to compete against agents affiliated with banks, see *United Services Auto. Ass'n v. Muir*, 792 F.2d at 364, then it was not in any meaningful sense "aimed at protecting or regulating," even "indirectly," "the relationship between the insurance company and its policyholders." *Fabe*, 113 S. Ct. at 2208; see *National Securities*, 393 U.S. at 460 ("The crucial point is that here the State * * * is not attempting to secure the interests of those purchasing insurance policies.").

In either case, Section 626.988 was not "enacted * * * for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act.

II. SECTION 92 "SPECIFICALLY RELATES TO THE BUSINESS OF INSURANCE"

Even if the court of appeals was correct in concluding that Section 626.988 satisfied the first requirement for protection from preemption under the McCarran-Ferguson Act, 12 U.S.C. 92 nonetheless preempts application of the state law to petitioner. McCarran-Ferguson defeats the normal preemptive effect of federal law only if a state law was enacted for the purpose of regulating the business of insurance *and* if the conflicting federal law does not specifically relate to that business. 15 U.S.C. 1012(b). We believe that Section 92 does "specifically relate[]" to the insurance business for these purposes. In all events, if Section 626.988 was enacted for the purpose of *regulating* that business, as the court of appeals concluded, then Section 92 certainly "specifically *relates*" to the insurance business for McCarran-Ferguson purposes.

1. As this Court has recognized, the term "relating to" is a broad one, meaning "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)); see also *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677-1680 (1995) (interpreting term "relate to" in preemption provision of Employee Retirement Income Security Act of 1974 (ERISA)); *Shaw v. Delta Air Lines, Inc.*,

and that the word is used in 18 U.S.C. § 1024. The term plainly encompasses more than is indicated by the use of the word "regulate," which connotes control, direction, or governance of an ongoing activity, rather than mere relationship. See Black's Law Dictionary (1990) (11th ed. 1990); Webster's Third New International Unabridged Dictionary 1913 (1966). See *Waltz*, 312 U.S. 471, at 2218 regarding "regulating" with "subjecting, managing, or controlling".

Under Section 1024(a) a federal law must also "specifically relate[]" to the business of insurance in order to preempt a contrary state rule. As the Court has noted, the history of the McCarran-Ferguson Act confirms that by using that limiting language, the Act's drafters intended that federal laws "merely . . . relating to interstate commerce" could not preempt state insurance laws by implication. Instead, before preemption was authorized, the drafters "want[ed] to be sure that the Congress, in its wisdom, [had] acted[] specifically with reference to insurance in enacting the [Federal] law." *Feltz*, 122 U.S. 471, at 2211 (quoting 16 Cong. Rec. 1487 (1845) (statement of Sen. Ferguson)).

Although Section 92 does not appear to regulate the business of insurance, it clearly meets the "specifically relates" standard. Section 92 authorizes certain national banks to "act as the agent for any fire, life, or other insurance company" otherwise authorized to do business in the relevant State, "by soliciting and selling insurance and collecting premiums on policies," and to "receive for services or rendered such fees or commissions as may be agreed upon . . . with the insurance company for which [the bank] may act as agent." 12 U.S.C. § 92. Apart from authorizing the Comptroller to prescribe "such rules and regu-

lations" as he deems necessary to regulate those activities, Congress added two specific provisos: The bank may guarantee neither the payment of any premium on a policy issued through its agency, nor the truth of any statement made by a customer in applying for insurance. Section 92 therefore both permits banks to operate insurance agencies, and places specific limits on a bank's ability to interpose itself, as agent, in the relationship between insurer and insured. Those statutory functions unquestionably "specifically relate[]" to the business of insurance for the preemption-related purposes of the McCarran-Ferguson Act.⁶ See *John Hancock Mut.*

⁶ In recent years the banking and insurance industries, and their respective legislative supporters, have focused in part on Section 92, precisely because it has been seen as specifically authorizing at least some degree of incursion by banks into "the business of insurance." In 1987, Congress imposed a one-year moratorium on, among other things, any expansion of a national bank's "insurance agency activities pursuant to the Act of September 7, 1916 (12 U.S.C. 92), into places where [the bank] was not conducting such activities as of March 5, 1987." Competitive Equality Banking Act of 1987 (CEBA), Pub. L. No. 100-86, Tit. II, § 201(b)(5), 101 Stat. 583. The Senate Banking committee's report on that legislation, including strongly worded dissenting views, indicates that dispute over the proper interpretation of Section 92 was one aspect of a fierce legislative struggle over continuing limitations on banks' ability to enter and compete in the securities, real estate, and insurance businesses. See, e.g., S. Rep. No. 19, 100th Cong., 1st Sess. 3-4, 16-17 (specifically noting dispute over scope of insurance agency authority conferred by Section 92), 86-87 (dissenting views), 89-93 (dissenting views) (1987). Senator Garn's dissenting views, for example, complained that the proposed legislation would "coddle[] the securities, insurance, and real estate industries by moving backwards toward protected, segmented markets and easy profits," *id.* at 89, and specifically empha-

Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 525 (1993) (ERISA “obviously and specifically relates to the business of insurance”).

2. The court of appeals held that Section 92 did not “specifically relate[]” to the insurance business, in part because the court concluded that in enacting the statute “Congress was concerned with banking, not insurance.” Pet. App. 15a. That is a *non sequitur*. Unlike the first part of the McCarran-Ferguson preemption test, which requires inquiry into the existence of a legislative “purpose to regulate the business of insurance,” the second part focuses on whether the provision in question has some objective relationship to the insurance business. We may certainly assume that in authorizing national banks in small towns to sell insurance, Congress’s primary purpose was to regulate banking. But the regulation Congress imposed gave certain banks the authority to act as agents for the sale of insurance. Whatever its primary regulatory purpose, such a law plainly and

sized that “the involvement of state-chartered [as opposed to national] banks in the insurance business has produced demonstrable competitive benefits to consumers in those states; yet the bill’s moratorium moves squarely in the direction of ending that for the benefit of a protected insurance industry” (*id.* at 92). See also CEBA §§ 201(d) (“Nothing in this [moratorium] section may be construed to increase or reduce the insurance authority of * * * national banks under current law.”) and 201(e) (dealing with “insurance activities” of state-chartered banks); H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 147-150 (1987); Statement by President Ronald Reagan upon Signing H.R. 27, 100th Cong., 1st Sess., 23 Weekly Comp. Pres. Docs. 918 (1987) (criticizing “retrogressive moratorium on the ability of Federal bank regulators to authorize [banks to offer] new real estate, securities, and insurance products and services to consumers”).

specifically relates to the business of insurance by permitting some banks to engage in one aspect of that business.⁵

The court of appeals also reasoned that Section 92 could not relate to the business of insurance because it was passed at a time when the regulation of that business was thought to lie beyond the scope of congressional power under the Commerce Clause. Thus, “Congress could not have been attempting to regulate a business that it believed it had no power to regulate.” Pet. App. 15a (citing *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868)). That analysis, however, again confuses the McCarran-Ferguson inquiry whether a state law seeks to regulate the business of insurance with the question whether the conflicting federal law “specifically relates” to that business. Whatever else Congress may have intended when it enacted Section 92, it surely sought to authorize national banks operating in small towns to act as insurance agents. There is no reason to doubt that Congress has always correctly understood that it had the power to grant such authority to national banks, which have, since their creation, been recognized as

⁵ Section 92 formerly also authorized small-town national banks also to “act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located.” Act of Sept. 7, 1916, ch. 461, 39 Stat. 753; see 12 U.S.C. 92 note. Congress deleted that language in 1982. Garn-St. German Depository Institutions Act of 1982, Pub. L. No. 97-320, Tit. IV, § 403(b), 96 Stat. 1511. The change conformed Section 92 to the amended provisions of 12 U.S.C. 371, which “simplif[ied] the statutory framework by which national banks are authorized to engage in real estate activities” by deleting “rigid statutory standards” and authorizing the Comptroller to promulgate regulations. S. Rep. No. 536, 97th Cong., 2d Sess. 60 (1982).

"instruments designed to be used to aid the [national] government in the administration of an important branch of public service." *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 33 (1876); see also, e.g., *First Nat'l Bank v. California*, 262 U.S. 366, 368-69 (1923); *Easton v. Iowa*, 188 U.S. 220, 238 (1903); *Davis v. Elmira Sav. Bank*, 161 U.S. at 283.⁶

Finally, the court of appeals read too much into this Court's statement in *Fabe* that the McCarran-Ferguson Act "is, in effect, a clear statement rule" that state laws regulating the insurance business "do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." Pet. App. 13a (quoting *Fabe*, 113 S. Ct. at 2211). The Act itself requires only that a federal law "specifically relate[]" to the business of insurance; it does not require, as the opinion below suggests, that the provision expressly state that conflicting state laws will be preempted. Indeed, such a requirement would make little sense. The McCarran-Ferguson Act was intended, at the time of its passage, to provide preemption rules for both existing and future laws. *Fabe*, 113 S. Ct. at 2211 (quoting 91 Cong. Rec. 1487 (1945) (statements of Sens. Ferguson and O'Mahoney)). Other than by coincidence, however, past laws would have been unlikely to contain language complying with a drafting requirement that was not imposed until after their enactment. And future laws that

⁶ In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 556-559 (1944), which upheld a price-fixing suit against an association of insurance companies, this Court rejected the argument that Congress must have intended to exclude the insurance business from the Sherman Act because at the time that Act was passed Congress was thought to have no power to regulate that business under the Commerce Clause.

specify their preemptive effect upon state law have no need for the sort of general preemption rule that McCarran-Ferguson provides.⁷

3. Finally, if the court of appeals was correct to conclude that Section 626.988 was enacted "for the purpose of regulating the business of insurance" within the meaning of McCarran-Ferguson, then Section 92 must certainly "specifically relate[]" to that business for purposes of the Act. Section 92 and Section 626.988 conflict because they are in large part mirror images, one authorizing and one forbidding certain insurance agency activities on the part of certain national banks. If Florida's effort to preclude small-town banks (when owned by or affiliated with holding companies) from selling insurance is a regulation of "the business of insurance," then Congress's express permission for them to do so must certainly "specifically relate[]" to the same business.

The court of appeals' holding to the contrary is internally inconsistent. As discussed above, in our view Section 622.988 was not enacted for the purpose of regulating the insurance business, while Section 92 specifically relates to that business. That analysis depends on the fact that the term "relates" is considerably broader in application than the term "regulate." It might be plausible to hold that both Florida's attempt to restrict banks from acting as insurance

⁷ As originally approved, the Act stated that "[n]o act of Congress * * * shall be construed to invalidate, impair or supersede" state laws "enacted for the purpose of regulating the business of insurance * * * unless such act *specifically so provides*." 91 Cong. Rec. 488 (1945) (Senate); *id.* at 1085 (House) (emphasis added). That language was rejected in conference, and replaced by the "specifically relates" language of the present Section 1012(b). 91 Cong. Rec. 1396 (1945).

agents, and Section 92's limited permission to certain banks to do so, "concern banking, not insurance." Pet. App. 14a-15a. In that case, the McCarran-Ferguson Act would have no application, and federal law would prevail. Alternatively, one might possibly conclude that the state law was enacted to regulate, and that the federal law specifically relates to, "the business of insurance," in which case McCarran-Ferguson allows preemption by its terms. It is wholly implausible, however, to treat the state law at issue here as one enacted to regulate the insurance business, while holding that a directly conflicting federal law does not even "relate" to that business. That implausible interpretation is the only one under which respondents could prevail in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
JACOB M. LEWIS
Attorneys

JULIE L. WILLIAMS
Chief Counsel

L. ROBERT GRIFFIN
ERNEST C. BARRETT, III
JOAN M. BERNOTT
Attorneys

*Office of the Comptroller
of the Currency*

NOVEMBER 1995

10
No. 94-1837

Supreme Court, U. S.
FILED
NOV 8 1995

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,
v.

TOM GALLAGHER, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AMICUS CURIAE
FLORIDA BANKERS ASSOCIATION
IN SUPPORT OF PETITIONER

J. THOMAS CARDWELL
Counsel of Record
VIRGINIA B. TOWNES
AKERMAN, SENTERFITT &
EDSON, P.A.
255 South Orange Avenue
Citrus Center—10th Floor
Post Office Box 231
Orlando, Florida 32802
(407) 843-7860
Counsel for Amicus Curiae

November 8, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D. C. 20001

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1837

BARNETT BANK OF MARION COUNTY, N.A.,
v. Petitioner,TOM GALLAGHER, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, et al.,
Respondents.On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh CircuitBRIEF OF AMICUS CURIAE
FLORIDA BANKERS ASSOCIATION
IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

Florida Bankers Association is a trade association representing over ninety per cent of the commercial deposits and over eighty per cent of the banks in Florida. For more than a decade, the Florida Bankers Association has been actively involved in the representation of Florida financial institutions with respect to the impact of state statutes on the sale and distribution of insurance products. The issues in this case affect its members directly. It appeared as *amicus curiae* in *Glendale Federal Savings and Loan Association v. State of Florida, Department of*

Insurance, 587 So. 2d 534 (Fla. 1st DCA 1991), *review denied*, 599 So. 2d 656 (Fla. 1992), and as petitioner in the administrative proceedings challenging the promulgations of rules purporting to implement section 626.988, Florida Statutes, *State, Department of Insurance v. Great Northern Annuities*, 1995 WL 492956, 20 Fla. L. Weekly D1928 (Fla. 1st DCA August 21, 1995).

Florida Bankers Association also appeared as *amicus curiae* in this action before the Eleventh Circuit.

All parties to this proceeding have consented to the filing of this brief. The written consents are filed herewith.

STATEMENT OF THE CASE AND OF THE FACTS

Amicus Curiae Florida Bankers Association adopts the Statement of the Case and the Statement of the Facts of Petitioner Barnett Bank of Marion County, N.A.

SUMMARY OF THE ARGUMENT

Florida Statutes section 626.988 is an anti-affiliation statute which prohibits agents licensed by the Department of Insurance from engaging in insurance agency activities in association with financial institutions. It was enacted for the sole purpose of prohibiting financial institutions (as that term is defined in the statute) from participating in the distribution chain of insurance products. It was not enacted for the purpose of managing, adjusting or controlling the relationship between the insurance company and its policy holders, the "business of insurance" as that term is understood in the application of the McCarran-Ferguson Act's negative preemption.

The Florida statute was passed in response to federal administrative proceedings which had the potential effect of allowing financial institutions to compete directly with insurance agencies in the marketing of insurance products. The legislative history surrounding the introduction

and the passage of the statute unequivocally characterizes the purpose of the statute as being to prevent financial institutions from selling insurance to the public because they might engage in coercive marketing and unfair trade practice or create an undue concentration of economic resources.

The Florida appellate court recognized these three elements as the controlling purpose of the statute. When financial institutions seeking to exercise agency powers challenged the constitutionality of the statute, the Florida First District Court of Appeal accepted the arguments of the Department of Insurance and held that the police power of the state was rationally exercised to prevent coercion, unfair trade practices and undue concentration of economic resources. The regulation of financial institutions was the sole purpose asserted for the statute. The regulation of the business of insurance was never raised as a justification for the statute.

Indeed, the Department of Insurance itself acknowledged the purpose and scope of the statute by recognizing that the ownership and control of an insurance company by a financial institution did not run afoul of the prohibitions of section 626.988, but the control of an insurance agent by a financial institution was a direct violation of the statute.

Faced with the challenge of Barnett Bank of Marion County, N.A.'s exercise of the banking powers granted under 12 U.S.C. § 92, the Department has had to develop a new theory of the purpose of the statute—one which would bring section 626.988 within the shelter of McCarran-Ferguson. The only argument that the Department has been able to develop is the hypothesis that financial institutions will ultimately control insurers, by virtue of the financial institutions' control of the insurance market. The argument defies logic and economic reality. The presence of financial institutions within the distribution stream of insurance products can only increase competition among marketers, thus minimizing the ability of any

group, be it agents or agencies or financial institutions, to exercise monopsony power over the market. Moreover, Florida's insurance code contains a number of statutes, unrelated to section 626.988, which effectively prevent the danger the Department projects.

The Department's newly minted analysis of the legislative purpose of section 626.988 cannot change the fact that the statute was neither intended nor crafted to regulate the business of insurance. Rather it was another salvo in the never-ending battle to erect insurmountable barriers between financial institutions and the marketing of insurance products.

McCarran-Ferguson does not save from preemption statutes enacted to preserve the insurance market for agents. Section 626.988 serves no other purpose.

ARGUMENT

"Section 626.988 has generally served to limit the activities of financial institutions in the marketing of insurance"

—Donald A. Dowdell
Director of Insurance Services
[R5-36]

I. SECTION 626.988 WAS NEVER INTENDED TO REGULATE THE BUSINESS OF INSURANCE BUT RATHER TO PROTECT THE PUBLIC FROM THE ALLEGEDLY OVERREACHING ACTIVITIES OF FINANCIAL INSTITUTIONS.

Federal law, specifically 12 U.S.C. § 92, authorizes national banks to sell insurance in towns with populations of less than 5000. Florida's anti-affiliation statute, section 626.988, excludes financial institutions from the distribution chain of insurance products in Florida. Clearly, 12 U.S.C. § 92 would preempt Florida Statute section 626.988, but for the effect of the McCarran-Ferguson Act.

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), exempts from preemption those state statutes which are

enacted "for the purpose of regulating the business of insurance." The scope of that exemption is not coextensive with the commerce of insurance, however. This Court defined the parameters of the exemption in *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453 (1969):

The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they must be placed in the same class. But whatever the exact scope of the statutory term, **it is clear where the focus was—it was on the relationship between the insurance company and the policy holder.** Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the business of insurance.

Id. at 460 (emphasis added).

This gloss, specifically as applicable to the first clause of 15 U.S.C. § 1012(b), was further refined in *United States Department of the Treasury v. Fabe*, 508 U.S. —, 113 S. Ct. 2202 (1992). This Court rejected the notion that the "business of insurance" in that context was limited to the writing of the contract; rather, it included the performance of the insurance contract:

The broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention or aim" of **adjusting, managing, or controlling** the business of insurance. Black's Law Dictionary 1236, 1286 (6th ed. 1990). This category necessarily encompasses more than just the "business of insurance." For the reasons expressed above, we believe that the actual performance of an insurance contract is an essential part of the "business of insurance."

Id., 113 S. Ct. at 2210 (emphasis added).

Certainly, McCarran-Ferguson does not protect from preemption a statute which was enacted for a purpose **other than** the regulation of insurance.

Section 626.988, Florida Statutes, prohibits insurance agents from working for or with financial institutions:

(2) No insurance agent or solicitor licensed by the Department [of Insurance] who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

The legislative and judiciary history of this statute unmistakably reveals that the purpose for which the statute was enacted was "to limit the activities of financial institutions in the marketing of insurance . . ." as specifically stated by Donald A. Dowdell in the hearing before the trial court. [R5-36] It was not enacted "for the purpose of regulating the business of insurance" as that phrase is used in the McCarran-Ferguson Act.

A. Section 626.988 Was Enacted for the Purpose of Eliminating Banks From the Distribution Chain of Insurance Products and Not for the Regulation of Insurance.

The legislative history of section 626.988 shows unequivocally that the statute was enacted for the purpose of building an insurmountable barrier between financial institutions and insurance agents' business of marketing insurance.

In 1974, when section 626.98 was enacted, a case was wending its way through the federal administrative proceeds which had the potential of opening the **marketing** of insurance (as opposed to the business of insurance) to financial institutions. That proceeding, summarized in *Florida Association Insurance Agents, Inc. v. Board of*

Governors of the Federal Reserve System, 591 F.2d 334 (5th Cir. 1979), arose when Barnett Bank of Florida, Inc., and other financial institutions sought the Federal Reserve Board's approval to sell insurance. Insurance agents strongly resisted banks' entry into the distribution of insurance. After a lengthy and complex hearing, an administrative law judge recommended that the application be approved with certain conditions—that the financial institutions' insurance forms contain anticoercion statements and that the financial institutions be allowed to market insurance *only where they controlled less than fifteen percent of the banking market*. The administrative law judge found that there were potential adverse effects from granting the applications. Among those was an increased (but not necessarily "undue") concentration of market power which would, in turn, "decrease competition within the insurance industry." 591 F.2d at 340. This anti-competitive effect would potentially reduce the "opportunities for individual entrepreneurs." *Id.* at 341.

In order to circumvent the effect of that recommended ruling, Representative Hyatt Brown (himself a principal in a large insurance agency) and others introduced before the Florida Legislature "A bill to be entitled An act relating to insurance; creating § 626.988 Florida Statutes; . . ." [App. B] The Preamble to that bill recited the procedural status of the applications and the administrative law judge's recommendation, then went on to quote from his findings:

- a) ". . . [T]he entry of large banking institutions into the insurance agency business in areas where the banks have a large concentration of resources would result in the demise of small insurance agencies or their transformation into large combinations. This would decrease competition within the insurance industry and reduce the opportunity for youths, veterans and women to gain a foothold in which [here a word is scratched out and the following word

substituted] ultimately they could participate as owners or managers."

- b) "... [W]hile there is a minor convenience in bank affiliated insurance agency sales in the case of personal lines such as automobile and homeowner's coverages, the convenience advantage in the case of commercial financing-insurance appears insignificant."
- c) "... [I]t appears that the gains in efficiency [by] the bank affiliated insurance agencies will largely benefit the applicants in terms of larger-scale operating economies," and "based upon their record of maximum charges for credit life insurance it is not reasonable to expect that the applicants will voluntarily lower premiums in other fields of insurance."
- d) "... [W]hile it is difficult to accurately measure the psychology of voluntary tying, nevertheless the weight of evidence [suggests the possibility of coercion in the sale of insurance to depositors]."
- e) "... [S]ince banks are predominantly the depositories [sic] of 'other peoples' money, therefore they should not be in competition with their depositors."

The bill then summarized the purpose and the authority for the enactment:

WHEREAS, the undue concentration of economic resources, a substantial decrease in competition among *insurance agents*, unfair competition, conflicts of interest and voluntary tying are against the public policy of the state and against the best interests of the people of Florida, and

WHEREAS, the United States Congress by the Federal Bank Holding Act of 1956, 12 USCA § 1846, specifically reserved to the states the power and au-

thority to enact legislation *with respect to bank holding companies*. . . .

(Emphasis added)

Two points are notable: First, the legislature recognized that section 626.988 was an act regulating bank holding companies and other financial institutions. The coercion ostensibly to be prevented was coercion by the financial institution. The unfair trade practices which the statute prevents are those which the financial institution could impose upon its customers to enhance the benefit to the financial institution. The concentration of economic resources feared was, according to the administrative law judge, the expansion of the financial institution's market.

Second, no issue of financial institution control over insurers was presented to the Legislature. That specter, which formed the bulk of the Department's justification for the statute before the trial court, is a chimera of recent creation.

B. The Judicial Interpretation of the Purpose and Function of Section 626.988 Demonstrates That the Statute Was Enacted to Regulate the Activities of Financial Institutions Rather Than the Business of Insurance.

In the mid-1980's, financial institutions challenged the constitutionality of section 626.988 on grounds of vagueness, violation of due process, violation of equal protection and federal preemption. *Glendale Federal Savings & Loan Association v. Department of Insurance*, 485 So. 2d 1321, 1322 (Fla. 1st DCA), *review denied*, 494 So. 2d 1150 (Fla. 1986). In upholding the constitutionality of the statute, *Glendale Federal Savings and Loan Association v. Department of Insurance*, 587 So. 2d at 534, the district court of appeal approved the trial court's delineation of the legislative purpose of the statute: prevention of coercion, unfair trade practices, and undue

concentration of economic resources **by financial institutions.** *Id.* at 536, n.1.

In essence, the court confirmed the preamble to the statute as it was passed. The court's interpretation of the purpose of the statute was limited to preventing financial institutions from exercising undue influence over their own customers or from cornering the insurance **sales** market.

Significantly, a review of the Judge Zehmer's dissenting opinion shows that the Department itself relied on the state's police power to regulate the relationship between the financial institution and its customers as the sole justification for the statute!¹

C. The Department Itself Interpreted the Statute as Regulating the Relationship Between Financial Institutions and Agents Rather Than the Business of Insurance.

At about the same time that Glendale Federal Savings and Loan Association was mounting its attack on the constitutionality of section 626.988, the Department of Insurance was asked to comment on the relationships between financial institutions and insurers which were not prohibited by the statute.

In 1985, American Pioneer Savings Bank requested an opinion from the Department as to whether the fact that American Pioneer Life Insurance Company was a wholly owned subsidiary of American Pioneer Savings Bank vio-

¹ Notably, the Department argued in that proceeding that section 626.988's exemption from the prohibitions of the statute of those banks located in cities having a population not in excess of 5,000 is "the same as that passed by Congress in its 1916 amendment to the 1864 National Banking Act, codified as 12 U.S.C. § 92." *Id.* at 538. Further, according to Judge Zehmer's dissent, "Not only is the purpose of the federal exemption consistent with the purposes of the Florida exemption, appellees [Department of Insurance] argue, federal preemption would preclude the application of the Florida statutory prohibition to federally chartered banks falling in this category." *Id.*, (emphasis added).

lated the anti-affiliation statute. The Department found absolutely no conflict between section 626.988 and a financial institutions' **direct** ownership and control of an insurer.

. . . In view of the fact that American Pioneer Savings Bank is the ultimate parent of American Pioneer Life Insurance Company, the specific issue which must be resolved in responding to your inquiry is **whether an independent agent appointed by American Pioneer Life is directly or indirectly associated with, or retained, controlled, or employed by American Pioneer Savings Bank. Absent such a relationship, Section 626.988 does not prevent American Pioneer Life and its agents from marketing insurance in this state.**

. . . These corporate relationships in and of themselves do not create a prohibited relationship between American Pioneer Savings Bank and independent insurance agents appointed by American Pioneer Life.

. . . It is recognized that as the corporate parent, American Pioneer Savings Bank may influence or control various corporate activities of its subsidiaries **which would not entail control of the solicitation, effectuation and servicing of coverage by insurance agents. If, in fact, American Pioneer Savings Bank does not directly or indirectly control the conduct of insurance activities by American Pioneer Life agents but, instead, the agents sell insurance free of influence from the financial institution, the prohibitions of the statute are inapplicable.**

[R5—82-83; Department of Insurance Exhibit 1 at 12-13, filed separately in the Record] (emphasis in bold added; underlining in Department of Insurance Exhibit 1).

The sole legislative purpose the Department recognized in 1986, more than a decade after the enactment of section 626.988, clearly related to the ability of the finan-

cial institution to control the **marketing** of the insurance, the "solicitation, effectuation and servicing of coverage," by agents. The relationship prohibited by section 626.988, according to the Department at that time, was solely the relationship between the financial institution and the agent.

II. THE DEPARTMENT'S ATTEMPT TO BRING SECTION 626.988 WITHIN THE PROTECTION OF McCARRAN-FERGUSON IS ILLOGICAL AND UNSUBSTANTIATED IN FACT OR IN ECONOMIC THEORY. IT MERELY CONTINUES ECONOMIC PROTECTIONISM FOR AGENTS AND DOES NOT REGULATE THE BUSINESS OF INSURANCE.

Section 626.988 exists solely to prevent financial institutions from competing with independent agents in the field of insurance marketing. The Department is charged by law with implementing and defending this legislative purpose. When faced with Barnett Bank of Marion County, N.A.'s exercise of rights granted it under 12 U.S.C. § 92, the Department recognized McCarran-Ferguson as its only refuge. In spite of the legislative, administrative and judicial history of the statute, the Department had to cut its suit before the trial court to fit the cloth of this Court's definition of "the business of insurance" set forth in *Securities and Exchange Commission*, and *Fabe*. Unfortunately, the suit does not fit the facts, the law, or the Department's own actions.

The Department attempted to rationalize the economic protectionism of section 626.988 as necessary to the protection of the consumer [R5—22-23, 78], thus regulating the relationship between the **insurer** and the **policyholder** and bringing section 626.988 within the ambit of the judicial definition of "regulating the business of insurance." One Department witness hypothesized the potential for a conflict of interest "if the financial institution derives income from the sale of insurance by the insurance agent." [R5—23] The astounding, illogical, and entirely unsubstantiated premise underlying this hypo-

thesized conflict of interest is that the financial institution would "control" the insurer by virtue of the volume of business the individual financial institution would be able to provide.

So when they [the financial institution] get control of the insurer, because they control so much of its volume, and they make money based on per transaction and per volume, they are motivated to see the volume and the per transaction counts pressed way up, and that's what controls the insurance, insurer's decision making, not the traditional proper insurance company's criteria, is this a good risk, does this risk fit our established actuarial projections on which our rates are based.

[R5-67] What is not explained, and cannot be, is what market force prevents the insurer from marketing through other agents, agencies or financial institutions. The Department's parade of horrors can exist **only in a closed market!** Yet the very entry of financial institutions into the distribution chain opens, rather than restricts, the market.

Most interestingly, the Department ignores the fact that financial institutions have lawfully marketed certain insurance products in the state of Florida, *e.g.*, credit life insurance; that the statute excludes certain other financial institutions from the prohibitions of the statute, *e.g.*, credit unions; and that since the mid-1980's, agents have marketed annuities on financial institution premises with the Department's authorization. Insurers, financial institutions, agents and the public of the state of Florida have all survived the long and varied history of this lawful association between insurance agents and financial institutions virtually unscathed. The argument of the Department overlooks and is inconsistent with the fact that financial institutions have been engaged in the sale of insurance for over 20 years and are currently permitted to do so in 22 states.

In addition, Mr. Dowdell, Director of Insurance Services for the Department, testified to the existence of a number of other statutes in Florida's Insurance Code, section 626.7491, section 628.801, the Third Party Administrator Statute, Chapter 626, Part VII, section 626.9451, section 626.955, and section 626.9551, which effectively prevent the hypothesized potential abuse. [R5—28-35, 47-51]

The Department's inventive and imaginative justification for treating section 626.988 as a statute regulating the business of insurance is completely belied by the reality which surrounded the birth of this law and the interpretation that the Department and the agents have consistently given it.

McCarran-Ferguson was not enacted to preserve economic opportunity for any segment of commercial endeavor. Absent a legislative purpose to regulate the business of insurance, section 626.988 is not entitled to the negative preemption of the Act. Nothing in the testimony of either Department witness relates the recognized legislative purposes of prevention of coercion, prevention of unfair trade practices or the prevention of undue concentration of economic resources, to the " 'end, intention or aim' of adjusting, managing or controlling the business of insurance," *Fabe*, 113 S. Ct. at 2210, or the relationship between the insurer and the policy holder. *Securities & Exchange Commission*, 393 U.S. at 460. In light of the written legislative history, the judicial interpretation of the legislative purpose, and the Department of Insurance's own implementation of the statute so as to exclude financial institutions from the distribution chain of insurance products, section 626.988 cannot be held to be a law enacted for the purpose of regulating the business of insurance.

CONCLUSION

For the reasons set forth above, amicus curiae Florida Bankers Association respectfully urges the Court to reverse the decision of the Eleventh Circuit Court of Appeals in this cause.

Respectfully submitted,

J. THOMAS CARDWELL
Counsel of Record
 VIRGINIA B. TOWNES
 AKERMAN, SENTERFITT &
 EIDSON, P.A.
 255 South Orange Avenue
 Citrus Center—10th Floor
 Post Office Box 231
 Orlando, Florida 32802
 (407) 843-7860
Counsel for Amicus Curiae

November 8, 1995

APPENDICES

1a

APPENDIX A

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Case No. 92-4332RP

GREAT NORTHERN INSURED ANNUITY CORPORATION,
Petitioner,
vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-4333RP

FIRST UNION MORTGAGE CORPORATION,
Petitioner,
vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-4334RP

FLORIDA BANKERS ASSOCIATION,
Petitioner,
vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

Case No. 92-4335RP

ASSOCIATION OF BANKS IN INSURANCE, INC.,
Petitioner,
vs.

DEPARTMENT OF INSURANCE AND TREASURER,
Respondent.

2a

Case No. 92-4336RP

FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
vs. *Petitioner,*
DEPARTMENT OF INSURANCE AND TREASURER,
_____ *Respondent.*

Case No. 92-4347RP

JAMES MITCHELL & COMPANY and
JMC INSURANCE SERVICES CORPORATION,
vs. *Petitioner,*
DEPARTMENT OF INSURANCE AND TREASURER,
_____ *Respondent.*

Case No. 92-4351RP

FLORIDA CENTRAL CREDIT UNION, RAILROAD and INDUS-
TRIAL FEDERAL CREDIT UNION, GTE FEDERAL CREDIT
UNION and CREDIT UNION SERVICES, INC.,
vs. *Petitioner,*
DEPARTMENT OF INSURANCE AND TREASURER,
_____ *Respondent.*

Case No. 92-4352RP

FLORIDA ASSOCIATION OF INSURANCE AGENTS,
vs. *Petitioner,*
DEPARTMENT OF INSURANCE AND TREASURER,
_____ *Respondent.*

Case No. 92-6735RP

FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
vs. *Petitioner,*
DEPARTMENT OF INSURANCE AND TREASURER,
_____ *Respondent.*

3a

Case No. 92-6736RP

BARNETT BANKS TRUST COMPANY, N.A.,
BARNETT BANKS INSURANCE, INC. AND
BTI SERVICES, INC.,
vs. *Petitioners,*

DEPARTMENT OF INSURANCE AND TREASURER,
_____ *Respondent.*

Case No. 92-6737RP

FIRST NATIONWIDE BANK, A FEDERAL SAVINGS BANK,
vs. *Petitioner,*
DEPARTMENT OF INSURANCE AND TREASURER,
_____ *Respondent.*

Case No. 92-6760RP

MARKETING ONE, INC.,
vs. *Petitioner,*
DEPARTMENT OF INSURANCE AND TREASURER,
_____ *Respondent.*

Case No. 92-6762RP

LIBERTY SECURITIES CORPORATION,
vs. *Petitioner,*
DEPARTMENT OF INSURANCE AND TREASURER,
_____ *Respondent.*

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled cases on December 14-22, 1992, in Tallahassee, Florida.

* * * *

STATEMENT OF THE ISSUES

The basic issue for determination is whether proposed Rules 4-223.001-.011, as promulgated June 26, 1992 and amended October 16, 1992, and thereafter, constitute an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On June 26, 1992, the Department of Insurance published a new rule chapter implementing the provisions of section 626.988, Florida Statutes, and other statutes. Petitions challenging the rules were timely filed by Great Northern Insured Annuity Corporation (DOAH Case No. 92-4332RP), First Union Mortgage Corporation (DOAH Case No. 92-4333RP), Florida Bankers Association (DOAH Case No. 4334RP), Association of Banks in Insurance (DOAH Case No. 92-4335RP), Florida Association of Life Underwriters (DOAH Case No. 92-4336RP), James Mitchell & Company and JMC Insurance Services Corporation (DOAH Case No. 92-4347RP), The Minnesota Mutual Life Insurance Company (DOAH Case No. 92-4350RP), Florida Central Credit Union and Credit Union Services, Inc. (DOAH Case No. 92-4351RP) and Florida Association of Insurance Agents (DOAH Case No. 92-4352RP). The cases were consolidated by Order of the Hearing Officer.

On October 6, 1992, the Department published a Notice of Change which materially altered the rule chapter. Subsequently, Florida Association of Life Underwriters filed a new petition (DOH Case No. 92-6735RP). Barnett Banks Trust Company, N.A., Barnett Banks Insurance, Inc., and BTI Services, Inc. (DOAH Case No. 92-6736RP), First Nationwide Bank (DOAH Case No. 92-6737RP), American Bankers Insurance Co. and American Bankers Life Assurance Co. (DOAH Case No. 92-6738RP), Marketing One, Inc. (DOAH Case No. 92-6760RP), Florida League of Financial Institutions (DOAH Case No. 92-6761RP), and Liberty Securities

Corporation, (DOAH Case No. 92-6762RP) filed petitions to challenge the rules. In addition, California Federal Bank, Financial Institutions Insurance Association, Compulife, Inc., and the Florida Department of Banking and Finance were granted leave to intervene. All proceedings were consolidated.

The Department filed a Motion for Partial Summary Final Order that subsection (8) of section 626.988, F.S. had not been triggered. Great Northern Insured Annuity Corporation and James Mitchell and Company filed cross motions for Partial Summary Final Order that the subsection *had* been triggered and that state banks are thereby authorized to sell annuities in the state. The Department's motion was denied and the Petitioners' motions were granted, in an order entered on December 4, 1992.

The formal hearing was conducted from December 14 through December 22, 1992, with an opportunity for all parties to present exhibits and witnesses. Prior to and during the hearing, stipulations and changes in the rules resolved the issues raised in the petitions of Minnesota Mutual, (DOAH Case No. 92-4350RP), American Bankers Insurance Co. and American Bankers Life Assurance Co. (DOAH Case No. 92-6738RP) and Florida League of Financial Institutions, Inc. (DOAH Case No. 92-6761). Those cases were voluntarily dismissed.

The transcript was filed on March 8, 1993. Proposed final orders were filed on April 7, 1993.

FINDINGS OF FACT

Parties

1. Respondent, Department of Insurance (DOI) and Intervenor, Department of Banking and Finance (DBF) are state agencies charged with the regulation of insurance and banking activities, respectively.

2. Great Northern Insured Annuity Corporation (GNA) is an insurance company and agency operating in Florida

and elsewhere in space leased in financial institution lobbies, customer service areas and atriums. From its approximately eighty-four locations in Florida it markets annuities, securities and whole life insurance products.

Approximately one-third of its 1992 sales of \$130 million was in annuities. GNA's principal profits in Florida are derived from its sale of annuities, which it directly underwrites and services.

3. First Nationwide Bank (FNB) leases space in its lobbies and other common areas to insurance agencies and companies, including Vista Financial Group, (Vista). In 1992 Vista sold approximately \$13.5 million in annuities from the locations it leases from FNB.

4. First Union Mortgage Corporation (FUMC) is a financial institution with "grandfathered" insurance activities pursuant to section 626.988(5), F.S. It has also been granted a certificate of authority by DOI as a Third Party Administrator pursuant to section 626.88, F.S.

5. Florida Bankers Association (FBA) is a trade association of the banking industry in Florida. It represents its financial institution members.

6. The Association of Banks in Insurance Inc. (ABI) is a trade association of financial institutions and insurance companies.

7. The Florida Association of Life Underwriters (FALU) is a professional association of life, health and direct writer multi-line insurance agents with approximately 8,900 members.

8. James Mitchell and Co. and its subsidiary, JMC Insurance Services Corporation (JMC) are California corporations involved in marketing financial products, including annuities in Florida.

9. Florida Central Credit Union, Railroad and Industrial Federal Credit Union and GTE Federal Credit Un-

ion are state or federally chartered credit unions authorized to do business in Florida. Credit Union Services, Inc., a wholly owned subsidiary of GTE Federal Credit Union, sells insurance to credit union members.

10. The Florida Association of Insurance Agents (FAIA) is a trade association representing independent insurance agents in Florida.

11. Barnett Banks Trust Company, N.A. is a trustee for annuities issued by James Mitchell and Company. Barnett Banks Insurance, Inc. is a Florida licensed insurance company providing credit insurance of various types for credit extended by Barnett Banks throughout Florida. BTI Services, Inc. a subsidiary of Barnett, provides records administration services for insurers.

12. Marketing One, Inc., Liberty Securities Corporation and Compulife, Inc. market annuities to existing and prospective customers of financial institutions. Those marketing activities are conducted from lobbies, atriums or other central areas of the premises of the financial institutions.

13. The Financial Institutions Insurance Association is a California non-profit association of financial institutions and insurance companies with members in Florida who lease space to insurance agency tenants.

14. California Federal Bank is a federal savings bank operating branches in the State of Florida and leasing space to a company selling insurance in that space in bank branch offices.

The Statute

15. Although other sections of statutes are cited as "law implemented" in proposed Chapter 4-223, its undeniable focus is section 626.988, F.S., as described in the first rule of the proposed chapter:

4-223.001 Purpose. The purpose of these rules is to implement the provisions of Section 626.988,

Florida Statutes, and to ensure that customers of financial institutions conduct their business in an atmosphere free from direct or indirect coercion, unfair competition, and unfair or deceptive trade practices, and to implement those statutory provisions which prohibit insurance agents and solicitors who are directly or indirectly associated with, under contract with, or controlled by a financial institution from engaging in insurance agency activities as an employee agent, principal, or agent of a financial institution agency. These rules establish procedures and standards for insurance companies, agencies, agents and solicitors in their relationships and business arrangements with financial institutions.

16. Embodied in Florida's insurance code, a code described as more lengthy than the New Testament, Section 626.988 F.S. enacted in 1974, ". . . generally prohibits banking institutions from engaging in insurance agency activities. . . ." *Florida Association of Insurance Agents, Inc. v. Board of Governors*, 591 F.2d 334 (U.S. 5th Cir. 1979).

The prohibition is accomplished indirectly by forbidding licensed insurance agents or solicitors from engaging in insurance agency activities under certain relationships with financial institutions. There are exceptions to the blanket prohibition, including an amendment in 1990 to permit state chartered banks to sell annuities in the event that federal law permits federal banks to sell annuities.

17. After almost twenty years of attempted enforcement, DOI has described section 626.988, F.S. as "a vague statute with imprecise standards". (Notice of proposed rule, Florida Administrative Weekly, June 26, 1992)

The Rules

18. DOI's experience with interpretation and enforcement of Section 626.988, F.S. commenced in earnest in the early 1980's, when insurance companies began to

market annuities in the lobbies or public access areas of financial institutions. Many of these companies consulted with the department and obtained guidance as to the applicability of the law to their varied circumstances.

19. In 1985, American Pioneer Life Insurance Company, through its counsel, Edward Kutter, Esquire, inquired of Commissioner Gunter concerning the effect of the law on its operations. American Pioneer Life Insurance Company was a wholly owned subsidiary of American Pioneer Savings Bank.

20. Donald Dowdell, General Counsel of the department, responded by letter dated November 18, 1985. He analyzed the relationships among the insurer, the financial institution, and the insurance agents and determined that there was no significant probability of the financial institution exercising control over the agents:

. . . In view of the fact that American Pioneer Savings Bank is the ultimate parent of American Pioneer Life Insurance Company, the specific issue which must be resolved in responding to your inquiry is whether an independent agent appointed by American Pioneer Life is directly or indirectly associated with, or retained, controlled, or employed by American Pioneer Savings Bank. Absent such a relationship, Section 626.988 does not prevent American Pioneer Life and its agents from marketing insurance in this state.

. . . These corporate relationships in and of themselves do not create a prohibited relationship between American Pioneer Savings Bank and independent insurance agents appointed by American Pioneer Life.

. . . It is recognized that as the corporate parent, American Pioneer Savings Bank may influence or control various corporate activities of its subsidiaries which would not entail control of the solicitation, effectuation and servicing of coverage by insurance

agents. *If, in fact, American Pioneer Savings Bank does not directly or indirectly control the conduct of insurance activities by American Pioneer Life agents but, instead, the agents sell insurance free of influence from the financial institution, the prohibitions of the statute are inapplicable.*

(GNA Exhibit #8) (emphasis added)

Thus, in 1985, the department limited the prohibitions of section 626.988, F.S. to the financial institution's control of, and authority over, an agent's insurance activities.

21. By 1986, other aspects of an association became a concern of the department. Letters responding to inquiries outlined requirements that leased space and insurance sales literature be physically or visually separated from the functions of the financial institution. (GNA Exhibits #10, 13 and 16)

22. As a result of the body of opinions being circulated in the form of incipient policy, the department proposed rules implementing section 626.988. These proposed rules were later withdrawn before adoption, but the department continued to use them as guidelines.

23. During this period, DOI received a handful of complaints, mostly from agents. Douglas Shropshire, director of Agent and Agency Services during the relevant period, testified that he could not recall a single consumer complaint with respect to financial institutions engaging in the distribution of insurance products. Gail Connell, identified by Mr. Shropshire as "the Department's person most intimately familiar with field investigation of .988 issues" (Tr. at 760), agreed. (FUMC Exhibit #35, at 184-85 *See also*. FUMC Exhibit #36 at 347-50, 353)

24. In 1991, in anticipation of the rule-making mandate of section 120.535, the department reviewed its guidelines. As a part of that review, representatives of

the agents' associations, FALU, FAIA and others, were consulted as to the desirability of the rules.

25. In January, 1992, DOI published proposed rules that were substantially similar to the guidelines.

Donald Dowdell stated that the proposed rules published at that time represented the department's determination of a reasonable interpretation of the statute, adding, "[T]he line was drawn with the realization of what was happening in the real world today. We could have—I think the statute prohibits an association, and as I indicated yesterday, if we had wanted to be Draconian about it and make life easier on ourselves, we could have attempted to prohibit any kind of association and see how that would have flown." (FUMC Exhibit #36 at 260-261)

The rules published in January of 1992 were withdrawn in order to permit the department to correct some perceived inadequacies in the economic impact statement.

26. The rules were presented at a workshop and were republished in June, 1992. The rules were virtually the same as those published in January. A public hearing was held July 12, 1992.

On October 6, 1992, DOI published a Notice of Change which materially altered Rules 4-223.003, .004, and .005. According to the Notice of Change, the change was in response to comments received at the public hearing held July 12. More specifically, the amendments were the result of the department's adoption of FALU's position in its petition challenging the June version of the rules. The amendments most significantly provided a definition of "associated" or "associate" and forbade insurance agents from occupying space virtually anywhere within the confines of a financial institution.

27. Mr. Shropshire drafted the amendment to Rules 4-223.003-.005. His source for the definition of "associate" was Webster's Dictionary.

Mr. Shropshire testified that the modified proposal resulted from "explosive changes" in the number of banks involved in insurance in this state (Tr. at 793) and information which had come to his knowledge which indicated a need for a more restrictive rule. The two sources of information regarding insurance activities in Florida identified by Mr. Shropshire were the report prepared by investigator Ernest Ulrich in support of the economic impact statement and an ongoing investigation and prosecution of JMC for its marketing of annuities. Both sources predate or were contemporaneous to the June publication of the rules.

28. Mr. Shropshire's reason for the October change was the anticipated difficulty DOI faced in enforcing its rules as originally published. He stated, "So it was getting plain to us that we were going to have to very vigorously and closely and labor-intensively enforce the rule, if it was passed as it was promulgated in June of '92." (tr. at 808)

As described by Mr. Shropshire and others, the agency was concerned that insurance activities in financial institutions were not being conducted behind partitions, or even behind planters or other visual separations; and that bank agents were making referrals, taking telephone messages, and setting appointments for insurance agents who covered multiple bank branches on a "circuit-rider" system. Banks leasing space to agents also commonly paid bank employees a bonus for making appointments and referrals of customers to the agents.

29. DOI determined that these leasing arrangements established a strong connection between the bank and the agent, in effect wrapping the insurance program in the bank's colors and presenting it as another bank product. This, to DOI, justified the previously characterized "Dragonian" measures.

The banks' and other witnesses freely described the economic advantage to a financial institution of having

insurance services available at the same location for its customers.

30. Additional amendments to the proposed rules were published in December 1992. Those amendments acknowledge or track the statutory exceptions to the section 626.988(2), F.S. prohibitions. The rules therefore do not apply to mortgage insurance business, credit unions, banks located in cities having a population of less than 5,000, and the sale of annuities when national banks have been authorized to sell such annuities.

During the course of the formal hearing, the agency proposed a final change to the rules at issue, clarifying that Chapter 4-223 does not apply to credit life and disability insurance and credit unemployment insurance. (American Banking Insurance Co. Exhibit #1)

The Economic Impact

31. Dr. Tim Lynch, Director for the Center for Economic Policy Analysis for Florida State University, conducted surveys, collected data and analyzed the economic impact of the June 1992 version of the proposed rules. He prepared the economic impact statement for DOI.

32. Dr. Lynch was consulted by the department about the October changes to the proposed rules and did additional analysis on the impact of the proposed changes. The economic impact statement prepared for the June publication was not amended, but Dr. Lynch's observations are found in his notes, or what he terms a "work in progress". He discussed those observations with department staff and considers the economic impact of prohibiting leases to be at least in the \$ millions.

33. The agency did not republish an economic impact statement after the October changes, but plainly considered the impact of those changes as articulated by its consultant, Dr. Lynch.

34. Prohibiting the sale of annuities on bank premises would have a devastating effect on companies engaged in

that activity. Banks, also, would be affected, as they recognize a substantial benefit of providing their customers the convenience of an in-house service.

35. Although annuities are defined in Florida law as "life insurance" (See Section 364.602(1), F.S.) they are generally considered investments for future security rather than a cushion against loss.

On March 20, 1990, the Office of the Comptroller of the Currency (OCC) issued a formal approval letter stating, among other things, that under controlling Federal banking law, annuities are primarily financial investment instruments that national banks are permitted and authorized to sell. (GNA Exhibit #41) A follow-up letter to J. Thomas Caldwell as representative of the Florida Bankers Association specifically concluded that federally chartered banks in Florida were authorized to sell annuities. (GNA Exhibit #42)

36. The OCC conclusion with regard to the authority of national banks was upheld in *the Variable Annuity Life Insurance Co. v. Robert Clarke, et al.*, (VALIC) on November 22, 1991, by the U.S. District Court for the Southern District of Texas, Civil Action #H-91-1016, 786 F. Supp. 639. The case is pending on appeal before the U.S. Court of Appeals for the Fifth Circuit. (*Variable Annuity Life Insurance Company v. Clarke*, Case No. 92-2010) In the meantime, the OCC continues to issue opinion letters consistent with its earlier opinion. (See 5/10/93 letter filed as supplemental authority on 6/18/93)

37. National banks are presently selling annuities, and the impact of the October 1992 absolute prohibitions is nullified as to annuity products by the December 1992 amendments addressed in paragraph 30, above.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to sections 120.54(4) and 120.57(1), F.S.

39. As acknowledged by Respondent, the standing of all parties has been established by stipulation. (Respondent's proposed final order, p. 12, paragraph 2.)

40. Subsection 120.54(4)(a), F.S. provides:

Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority.

"Invalid exercise of delegated legislative authority" is defined in Section 120.52(8), F.S. as

... action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:

(a) The agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54;

(b) The agency has exceeded its grant of rule-making authority, citation to which is required by s. 120.54(7);

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or

(e) The rule is arbitrary or capricious.

41. Petitioners have the burden of demonstrating by a preponderance of the evidence that the proposed rules constitute an invalid exercise of delegated legislative authority. *Adam Smith Enterprises, Inc. v. Florida Department of Environmental Regulation*, 553 So.2d 1260 (Fla. 1st DCA 1989).

42. In *Florida League of Cities v. Department of Environmental Regulation*, 603 So.2d 1363, 1370 (Fla. 1st DCA 1992), the First District Court clarified and simplified the standard of review a hearing officer applies to determine if a proposed rule policing the public interest constitutes an invalid delegation of legislative authority. The rules must be sustained as long as they are

“... appropriate to the ends specified in the enabling legislation and that the requirements proposed therein [are] reasonably related to the purpose of the enabling legislation.” *Id.*

43. *Florida League* discusses the evolution of common law and statutory criteria defining an invalid exercise of delegated legislative authority and makes clear that these criteria, with the exception of the material failure to follow rulemaking procedures, are grounded in the rational basis test. The court, reviewing a proposed rule challenge generally based on an invalid exercise of delegated legislative authority, states:

Although the only explicitly stated ground under section 120.54(4)(a) for challenging a proposed rule is that the proposed rule constitutes an invalid exercise of delegated legislative authority, case law, beginning notably with *Agrico Chemical Co. v. Department of Environmental Regulation*, 365 So.2d 759, 763 (Fla. 1st DCA 1978), *cert. denied sub nom., Askew v. Agrico Chemical Co.*, 376 So.2d 74 (Fla. 1979), has engrafted specific criteria that must be applied in determining whether the rule or proposed rule complies with the enabling statute. The challenger, among other things, is required to show that the requirements of the rule are inappropriate to the ends specified in the legislative act, or that the requirements proposed are *not reasonably related* to the purpose of the enabling legislation, or that the proposed rule is arbitrary and capricious. [citations omitted] These criteria have since been

codified by the 1987 legislature, amending section 120.52 by adding subsection (8) thereto, defining the term “invalid exercise of delegated legislative authority.”

Id. at 1367 (emphasis added). Thus, the court treats the amended section as simply a codification of existing common law reasonableness factors.

44. The court noted the similarity between these common law factors in rule challenges at the administrative trial level and equal protection challenges in which the rational basis standard is applicable, stating that the “same factors” are used in both in Florida. *Id.* at 1367-68. The court cites language relied upon in *Agrico* that

“[w]hen a commission promulgates a legislative regulation in the exercise of the police power designated to it by the legislature, it is subject to the same reasonableness and the basic facts justifying . . . the regulation as a statute.” *Id.* at 1368.

The test for statutes in equal protection challenges where the rational basis standard applies is that

“the constitutional requirement of equal protection does not inhibit the legislative power in securing the health, safety, morals, and general welfare of the public, and a classification enacted by the legislature for such purposes will not be annulled by the courts *unless it is wholly without a reasonable or practical basis, and therefore purely arbitrary.*” *Id.* (emphasis added).

45. The court further analogized these constitutional principles to the long-applied rule challenge principles in Florida. The court states:

Indeed, the principle applied in rule challenge proceedings that *an agency's interpretation of a statute need not be the sole possible interpretation, or even the most desirable one but need only be within the*

range of possible interpretations, [citations omitted] is merely a logical corollary of the rule often applied to determine the constitutional validity of the statute challenged on the ground that it offends the equal protection clause: that a statutory classification will not be invalidated under the rational basis test simply because it is not the best possible method, or the least burdensome for achieving the legislative purpose, or because there are other means available to obtain legitimate objectives. *Id.* at 1369 (emphasis added)

46. This most recent description of the appropriate standard in *Florida League* controls this proposed rule challenge proceeding. The legislature has determined that regulation of the insurance industry is necessary for the protection of the public welfare, and has granted DOI the authority to promulgate rules necessary to effectuate the statutes. Specifically, the department's authority is authorized in Section 624.308, Florida Statutes:

(1) The department may adopt reasonable rules necessary to effect any of the statutory duties of the department. Such rules shall not extend, modify, or conflict with any law of this state or the reasonable implications of such laws.

The court in *Department of Insurance v. Insurance Services Office*, 434 So.2d 908, 910 (Fla. 1st DCA 1983), *rev. denied*, 444 So.2d 416 (Fla. 1984), classified this authority:

Section 624.308(1) . . . is simply a *general grant of authority* to the Department to adopt reasonable rules necessary for the implementation of the Insurance Code with the further proviso that such rules as are promulgated by the Department may not extend, modify, or conflict with any law of this state or reasonable implications thereof. . . . [T]his is nothing more than a statement of what has always been the common law of the state. (Emphasis added.)

The legislature did not create a special standard for DOI rules and under *Florida League*, the reasonable basis standard would apply. This "highly deferential reasonable basis standard" requires the challenger to prove that the proposed rules are inappropriate to the ends specified in the enabling legislation and that the requirements therein are not reasonably related to the purpose of the enabling legislation. See *Department of Corrections v. Hargrove*, 615 So.2d 199, 201 (Fla. 1st DCA 1993) (reversing the invalidation of a proposed rule when the rule was reasonably related to the purpose of statute, and it was inappropriate for court or hearing officer to second-guess the agency).

47. Under the above-described standard some of the proposed rules are sustained; others must fail.

48. The legislature has made a public policy determination that separation of insurance activities and financial institutions is necessary for the protection of the public welfare. Section 629.988, Florida Statutes, reflects this intent. Section 626.988(2) provides:

No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is *associated with*, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or *associate* of a financial institution agency. (Emphasis added.)

This statute was recently unsuccessfully challenged on vagueness, equal protection, due process, unlawful delegation of legislative authority, and federal preemption grounds in *Glendale Federal Savings & Loan Association v. Department of Insurance*, 587 So.2d 534 (Fla. 1st DCA 1991), *rev. denied*, 599 So.2d 656 (Fla. 1992). In upholding the constitutionality of the statute, the court in *Glendale* identified the "legitimate state goals" behind the statute as being

"[c]oncerns regarding financial institutions' entry into insurance activities, including the *prevention of coercion, unfair trade practices, and undue concentration of resources.*" *Id.* at 536 n. 1 (emphasis added).

These are the goals that DOI seeks to achieve through its proposed rules.

49. Section 626.988, F.S., is not the only relevant law; other statutes form a crucial basis for the rules as well. The other statutory provisions that serve as a basis are summarized as follows:

Section 624.425, Florida Statutes, imposes certain resident agent and countersignature requirements for property, casualty, and surety insurance.

Section 624.428, Florida Statutes, provides that no life insurer may issue or deliver life and health insurance in this state unless the application is taken through and delivered by a licensed agent of Florida, but that this requirement does not apply to endorsements that do not involve a change in premium or payment of a commission.

Section 626.753, Florida Statutes, provides requirements for the sharing of commissions between licensed insurance agents and specifically prohibits the sharing of commissions between licensed agents and any corporation unless the corporation is an insurance agency.

Section 626.794, Florida Statutes, generally prohibits the sharing of commissions "directly or indirectly" between licensed life agents or life insurers and those who are not licensed agents.

Section 626.838, Florida Statutes, imposes restrictions on commission sharing by health insurance agents.

Section 626.9521, Florida Statutes, prohibits unfair methods of competition or deceptive acts or practices

and references the penalties for both willful and non-willful violations.

Section 626.9541, Florida Statutes, defines unfair methods of competition and unfair or deceptive acts or practices. Some of the unfair methods specifically included are misrepresentations and false advertising of insurance policies; false information and advertising in general (including knowingly directly or indirectly placing such information before the public); and boycotting, coercion, and intimidation that result in an unreasonable restraint or monopoly in the business of insurance.

Section 626.9551, Florida Statutes, entitled "Favored agent or insurer; coercion of debtors" states that no person may be required to negotiate an insurance policy through a particular insurance agent or broker as a condition to receiving a loan or the extension of credit. Also, the lender may not unreasonably disapprove an insurance policy, require a separate charge for the handling of substitution of an insurance policy, or disclose or use information of an insurance requirement for real property to the detriment of the borrower and to the advantage of the lender.

Section 627.5515, Florida Statutes, establishes certain requirements for group life insurance policies issued or delivered outside the state, with certain exceptions.

Section 627.6515, Florida Statutes, establishes certain requirements for group, blanket, and franchise health insurance policies issued or delivered outside the state.

Rules' Purpose

50. The above statutory provisions, in perhaps a lesser degree than section 626.988, F.S., still relate to the prevention of coercion, unfair trade practices, and the undue

concentration of resources. As cited in paragraph #15 above, rule 4-223.001 states the purpose of the proposed rules.

51. These are the goals identified by the court in *Glendale* as legitimate state goals underlying Section 626.988. Since these same goals form the common theme of other statutory provisions implemented, rule 4-223.001 is rationally related to the enabling legislation.

Rules' Scope

52. Proposed rule 4-223.002 provides the scope of the rules, establishing procedures and standards for "all insurance companies, agencies, agents and solicitors licensed or authorized to do business in Florida or doing business in Florida" that have any relationships with any financial institutions regarding the providing, offering, selling, marketing, or making available of insurance to, or otherwise affecting, the customers of the financial institution.

53. The scope necessarily and reasonably encompasses the regulation of agents, solicitors, insurance companies, and insurance agencies in order for the agency to effectively implement the purposes of the enabling legislation. Section 626.988, F.S. specifically mentions "agents" and "solicitors". However, section 626.988 regulates the *relationship* between financial institutions and the agents and solicitors. This prohibited relationship encompasses more than solicitors and agents, because it focuses on financial institutions' entry into insurance *activities*. As stated in *Glendale*, the legislature was guarding against the dangers of financial institutions becoming involved in the business of insurance: the prevention of coercion, unfair trade practices, and undue concentration of resources.

54. Limiting the scope to agents and solicitors ignores the nature and definition of insurance agencies; if insurance agents are regulated by the rule, the agencies will

be regulated as well. Section 626.094, Florida Statutes, defines an insurance agency as a

"business location at which an individual, firm, partnership, corporation, association, or other entity . . . engages in any activity which by law may be performed only by a licensed insurance agent or solicitor."

Similarly, insurance companies operate through agents and solicitors, so they too are affected by statutory regulations of the agents and solicitors. Although section 626.988 may be one of the principal statutes implemented, it is only part of the scheme of statutes, as summarized above, prohibiting coercion, unfair trade practices, and undue concentration of resources potentially caused by the financial institutions' entry into insurance activities. Section 626.9521 prohibits "any person" from engaging in deceptive practices. Therefore, section 626.9521 and the other provisions provide a broad base for the regulation of all the entities listed in the rules.

55. As stated in finding of fact #30, above, the scope of the rules was amended to clarify statutory exemptions. This language was added to proposed rule 4-223.002 after the December 4, 1992 order on motions for summary judgment:

Notwithstanding the foregoing, Chapter 4-223 shall not apply to mortgage insurance business contemplated, expressly or by reasonable implication, by Chapter 627, Part XXI, Florida Statutes. To the extent required by Section 626.988(8), Florida Statutes Rule Chapter 4-223 applies to the sale of annuities by agents in association with financial institutions, only if no national bank has been authorized to sell one or more types of annuities other than as authorized by 12 U.S.C. 92, or having been authorized to sell such annuities, such authorization is revoked, repealed, rescinded, or otherwise terminated.

This language strikes at the heart of the issues raised by the various parties involved in the sale of annuities. Based on the prevailing authority and evidence presented by those parties, this language effectively removes the sale of annuities from the scope of the rules and therefore from the rules' proscriptions.

Definitions

56. Proposed Rule 4-223.003 contains the definitions for terms contained in the rules. The rule includes this significant definition of "associated" and "associate":

- (2) For purposes of this entire rule chapter and enforcement of Section 626.988, Florida Statutes, the Department interprets the terms "associated" and "associate" as those terms are used in Section 626.988, as meaning: *united in a relationship, or connected or joined together, or connected in mind or imagination*. Therefore, instances of prohibited associated include, but are not limited to, situations wherein an agent or solicitor, themselves or through their employer:
 - (a) is in law or fact related or connected to the Financial Institution, as by formal or informal arrangement, contract, etc; or
 - (b) *is or may reasonably be expected to be connected with the Financial Institution in the mind or imagination of the general public* using the Financial Institution's facilities, as a result of the agent or solicitor's presence or activities on Financial Institution premises, or other conduct or activities by the agent or solicitor or done with their consent. (Emphasis added.)

Aside from idiosyncratic grammar and the ambiguous use of an open-ended "etc.", this definition offends any

rational interpretation of section 626.988, F.S. and is thoroughly useless as a standard for the agency's enforcement of that and other relevant statutes. It is vague and incomprehensible, like beauty, an "association" lies in the eyes (or mind) of the beholder. The definition relegates to the mind or imagination of the general public the determination of what relationships are prohibited. This is a fragile basis for enforcement, as should be apparent to the agency by the fact that so few complaints have come from the general public. That such definition is unenforceable is obvious from the agency's pained attempts to craft its earlier guidelines and from its intelligent and highly regarded attorneys' inability to articulate how it should be applied. (see generally, testimony of Dowdell and Shropshire) Proposed rule 4-223.003 violates section 120.52(8)(d), F.S.

57. The remainder of proposed rule 4-223.003, including that portion added in the December amendments simply reflects and refers to statutory definitions, and is appropriate.

Catalogue of Prohibited Associations

58. In contrast with the cosmic scope of the definition of "associate", the proscriptions of proposed rules 4-223.004 and .005 are specific, direct and unambiguous:

4-223.004 Prohibited Arrangements. No insurance agent or solicitor while in any Financial Institution atrium, Financial Institution office, Financial Institution lobby, Financial Institution foyer, Financial Institution board room, Financial Institution conference room, Financial Institution meeting room, Financial Institution customer service area, or other work area routinely utilized by Financial Institution staff and which is part of a Financial Institution's premises, or any location access to which will routinely have the agent's or solicitor's client passing through any of the preceding areas (except where

such passage is to or from a common elevator lobby as in and for the purpose stated in example 1 in rule 4-223.005 shall:

- (1) Rent, lease, or otherwise occupy space for transacting insurance, or
- (2) Meet with any persons or persons and in such meetings advise, counsel, provide information about, take applications, or assist in executing applications, regarding any aspect of insurance or any insurance produce, [sic] or
- (3) Transact insurance business, or
- (4) Advertise.

59. Proposed rule 4-223.005 contains allowable but restricted arrangements. Essentially, a financial institution may rent the upper floors to insurance agency and may be next door to an insurance agency as long as the two do not connect. If an insurance agency does rent space from a financial institution, the lease must be fixed and cannot be based on a percentage of income or otherwise tied to the transaction of insurance. There can be no common employees. The lease and all signs and sales literature must reflect the independence of the financial institution and agency according to specific requirements in the rule. In addition, the financial institution staff shall not answer the phone for or make appointments for the tenant agent. The financial institution may not perform administrative services or other functions customarily performed by an insurance agency in dealing with its customers. A lease in violation of this rule is deemed unlawful commission sharing and/or an unlawful association. The tenant insurance agency may sell insurance to the financial institution, however, in an arms-length transaction.

60. These provisions are a reasonable interpretation of the prohibitions of 626.988(2), F.S., which literally read, addresses insurance agency activities by an agent or solici-

tor acting as an employee, officer, director, agent, or associate of a financial institution agency. Section 626.988 (2), F.S. does not, as suggested by some testimony in this proceeding, forbid any and all associations between an agent and financial institution, but rather only those associations which promote or further the insurance agency activity. It does not, for example, forbid an agent from maintaining an account in a bank or selling a policy to a bank. But neither does it merely forbid those relationships comprising *control* by the financial institution.

61. Courts other than *Glendale* have addressed challenges to the statutory prohibitions of "associations" in myriad other contexts and have devised a reasonable meaning of the term:

"In the absence of a statutory definition of 'association' the cases have adopted a common sense reading of the term that focuses on the business of the enterprise and the relationship of the defendant to that business."

United States v. Yonan, 800 F 2nd 164 (7th Cir. 1986) *cert. den.*, 479 US 1055 (1987), (construing "associated with" under federal criminal RICO statutes).

62. Factual predicate for these rules is found in the enforcement experience of the agency and the Petitioners' candid testimony that the current common practices described in findings of fact #28 and #29, above, significantly benefit both the agent and host bank; the relationship is symbiotic.

63. In the existence of a factual predicate, the rules at issue here are distinguished from the rules found unconstitutional in the supplemental authority supplied by Petitioners, *Edenfield v. Fane*, 113 S.Ct. 1792 (1993).

The U.S. Supreme Court in *Edenfield* struck as violating free speech guarantees of the First and Fourteenth

Amendments Florida's Board of Accountancy rule prohibiting direct, in-person, uninvited solicitation by CPAs.

The rules here, as in *Edenfield*, affect commercial speech, which speech enjoys a measure of constitutional protection.

"... laws [and rules] restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny." *Id.*, at 4432 (citations omitted)

The substantial state interest was described and upheld in *Glendale, supra*. The agency has demonstrated that the rules here further that substantial state interest. The agency's catalogue of activities proscribed by Section 626.988(2), F.S., is within its universe of available choices.

64. Petitioners argue that the above proposed rules impair existing contracts in violation of Article I, Section 10, Florida Constitution. This issue may be properly raised in the context of an enforcement action but these rules do not, on their face, impair existing contracts. A hypothetical determination that future enforcement might be unconstitutional is beyond the scope of this proceeding. *GTE Florida, Inc. v. Dept. of Transportation*, 12 FALR 1515, 1527-28 (DOAH order entered 3/8/90).

65. With a few exceptions, addressed below, the remainder of the proposed rules, 4-223.006 through 4-223.011, are unchallenged except through the broad challenge to the agency's interpretation of "associate" or "associated". Nothing presented here justifies a wholesale invalidation of the entire rule chapter when that definition falls.

Rules Affecting "Grandfathered" and Third Party Administrator Status

66. Specific challenges to portions of the remaining rules are made by FUMC, the petitioner with "grandfathered" and Third Party Administrator status. (see finding of fact #4, above)

67. Section 626.988(5), F.S. allows financial institution agencies in operation on April 2, 1974 to continue to engage in insurance agency activities so long as they continue to function as constituted on April 2, 1974. The exemption is absolute:

Notwithstanding *any provision* of this section, the Department of Insurance *shall permit the continued operation* under the same ownership and control of all financial institution agencies which were in existence and engaged in insurance agency activities as of April 2, 1974 (emphasis added)

DOI attempts to prohibit those grandfathered institutions from engaging in activities not prohibited by 626.988, F.S. Rule 4-223.006(2)(d) provides in pertinent part:

Only the licensed insurance agent shall solicit insurance; a financial institution which is not otherwise engaged in insurance agency activities through an affiliated agency pursuant to Section 626.988(5), Florida Statutes, may endorse an insurance product or an insurance company but shall not under any circumstances solicit insurance.

68. Endorsement is not an activity prohibited to any financial institution pursuant to 626.988, or the rule would be an invalid exercise of delegated legislative authority permitting activity prohibited by the statute. Since section 626.988 does not prohibit endorsement by a financial institution no authority exists for prohibiting a grandfathered financial institution (exempt from the statute) from exercising those same rights and privileges.

69. Similarly, rule 4-223.006(2)(h)5.(i) imposes a restriction on grandfathered institutions not imposed on financial institutions as a whole by the statute:

(i) Financial institutions *which are not otherwise engaged in insurance agency activities through an affiliated agency pursuant to Section 626.988(5), Florida Statutes*, may mail out advertising literature for the agent and insurance company in connection with insurance coverages, . . . (emphasis added)

Here again, that which is not prohibited by statute is prohibited to grandfathered institutions, without statutory justification.

70. DOI has also embellished the *conditions* for maintaining grandfathered status. Proposed rule 4-223.011(4)(a)3, provides:

If the parent financial institution was not endorsing the insurance products solicited by the agency on April 2, 1974, or was not participating through endorsement or otherwise in the conduct of such solicitation, the financial institution is precluded from engaging in such activities.

71. Section 626.988(5), after granting the grandfather exemption, further directs how the exemption shall be administered by the Department:

. . . To make possible such continuation, the Department of Insurance may license agents and solicitors who are otherwise qualified, as successors to those agents and solicitors who are exempt from the provisions of this section and their successors, for so long as the specified financial institution agency continues to function as constituted on April 2, 1974.

DOI has included *operations* of the parent financial institution within its area of inquiry for determining whether the *constitution* of the financial institution agency has changed since April 2, 1974.

"Constitute" as used in section 626.988(5), F.S. refers to the manner in which composite parts of the grandfathered financial institution were organized, owned, or interrelated as of April 2, 1974. DOI recognizes this in rule 4-223.011(3) and (4)(a)(1) and (2), which restrict changes in ownership, limit the grandfathered institution to the same number of agents with which the financial institution agency was constituted as of April 2, 1974, and require that the original or successor agents hold the exact type (kind) and class (line) of licenses to which the grandfathered agents had been appointed. In this context, the limitation of the activities of a related financial institution in 4-223.011(4)(a)3, stands out as a legal *non sequitur*. The rule enlarges its law implemented.

72. "As constituted" means that the organization and ownership of the grandfathered entity remain the same. Grandfather rights are not transferrable to another organization. The grandfathered license or successor, however, cannot be restricted from exercising the same rights as any other person holding the same type of license. What is grandfathered is the right to hold the license in a financial institution agency that is functionally organized in substantially the same manner as it was at the time the statute was enacted. The statute does not give DOI the right to limit the scope of the license by restricting the type of business that can be performed by the agent.

This is particularly significant in light of a definition added in the October, 1992, Notice of Change. Rule 4-223.003(3) provides this definition of "Financial Institution":

As used in this rule chapter, the phrases "Financial Institution" and "Financial Institution staff" include all entities and their staff which are members of the same holding company group as the Financial Institution is a member of [sic], or are otherwise affili-

ated with the Financial Institution by common ownership or control.

By defining as staff of that agency all employees of any member of a bank holding company which holds a grandfathered financial institution agency, DOI extends the prohibitions against mailing advertisements and against endorsement which DOI has imposed on grandfathered financial institution agencies (albeit without legislative authority to do so) to nongrandfathered financial institutions which DOI otherwise recognizes are not prohibited by statute from endorsing insurance products.

73. Rule 4-223.011(4)(c) provides:

A financial institution or financial institution agency is prohibited from acting as a Third Party Administrator unless a financial institution agency was engaged in such activities as of April 2, 1974.

DOI cites section 626.988 and section 626.88, F.S. as statutory authority. Neither prohibits financial institutions or financial institution agencies from acting as Third Party Administrators. DOI has expanded and modified both statutes to prohibit an activity nowhere proscribed by statute.

Section 626.88 defines "administrator", in pertinent part, as:

(1) For the purposes of this part, an administrator is any person who directly or indirectly solicits or effects coverage of, collects charges or premiums from, or adjusts or settles claims on residents of this state in connection with authorized commercial self-insurance funds or with insure or self-insured programs which provide life or health insurance coverage or coverage of any other expenses described in s. 624.33(1), *other than any of the following persons:*

* * *

(c) an insurance company which is either authorized to transact insurance in this state or is acting as an insurer with respect to a policy lawfully issued and delivered by such company in and pursuant to the laws of a state in which the insurer was authorized to transact an insurance business.

* * *

(e) An insurance agent licensed in this state whose activities are limited exclusively to the sale of insurance.

* * *

(emphasis added)

74. Section 626.988 prohibits insurance agents or solicitors associated with financial institutions from engaging in insurance activities. It does not prohibit administrators from engaging in insurance activities as an associate of financial institution. Moreover, the definition of administrator, set forth above, distinguishes an "administrator" from an agent or insurance company.

Nothing in the Third Party Administrator statute (Chapter 626, Part VII, Florida Statutes) precludes a financial institution from being certified as a Third-Party Administrator. Nothing in section 626.988 addresses Third-Party Administrators. Notably, section 626.988 was enacted in 1974. Chapter 626, Part VII, was enacted in 1984. The legislature was aware of the purported dangers of affiliation and could have excluded financial institutions from the field of third-party administrators had it wished to do so. Instead the legislature apparently decided that a financial institution's operation as a Third-Party Administrator posed no threat of coercion, unfair competition or undue concentration of economic resources.

Single Subject Requirement

75. Section 120.54(8), F.S., requires that ". . . [e]ach rule adopted shall contain only one subject. . .".

In *Humhosco, Inc. v. Department of Health & Rehabilitative Services*, 476 So. 2d 258 (Fla. 1st DCA 1985), the court affirmed a hearing officer's determination that a rule did not violate section 120.54(8), Florida Statutes, the single subject requirement. The challenger asserted that the rule containing the general definitions also impermissibly contained a section that clarified the relationship between the proposed rule and adopted rules. Upholding the hearing officer's determination of validity, the court stated:

The hearing officer agreed . . . that the addition of [the section] did not violate the single-subject rule since it *logically falls* within the general definitions and provisions set forth in the [rule]. We likewise conclude that [the section] is *facially consistent with the subject matter and purpose* of [the rule].

Id. at 262 (emphasis added)

Petitioners' challenge in this proceeding must also fail. The subject matter of the rules at issue here logically relates to the purpose of establishing procedures and standards for insurance companies, agencies, agents and solicitors in their relationships and business arrangement with financial institutions, as stated in proposed rule 4-223.001.

The Economic Impact Statement (EIS)

76. Section 120.54(2), F.S. (1992) provides in pertinent part:

* * *

(b) Prior to the adoption, amendment, or repeal of any rule not described in subsection (9), an agency may provide information on its proposed action by preparing an economic impact statement, and must prepare an economic impact statement if:

1. The agency determines that the proposed action would result in a substantial increase in costs or

prices paid by consumers, individual industries, or state or local government agencies, or would result in significant adverse effects on competition, employment, investment, productivity, or innovation, and alternative approaches to the regulatory objective exist and are not precluded by law; or

2. Within 14 days after the date of publication of the notice provided pursuant to paragraph (1)(c) or, if no notice of rule development is provided, within 21 days after the notice required by paragraphs (1)(a) and (b), a written request for preparation of an economic impact statement is filed with the appropriate agency by the Governor, a body corporate and politic, at least 100 people signing a request, or an organization representing at least 100 persons, or any domestic nonprofit corporation or association.

An agency's determination regarding preparation of an economic impact statement pursuant to subparagraph (2)(b)1, shall not be subject to challenge.

* * *

(d) No rule shall be declared invalid based on a challenge to the economic impact statement for the rule unless the issue is raised in an administrative proceeding within 1 year of the effective date of the rule to which the statement applies. No person shall have standing to challenge an agency rule, based upon an economic impact statement or lack thereof, unless that person requested preparation of an economic impact statement under subparagraph (2)(b) 2, and provided the agency with information sufficient to make the agency aware of specific concerns regarding the economic impact of the proposed rule, by either participation in a public workshop, public hearing, or by submission of written comments, regarding the rule. The grounds for invalidation of a rule based upon a challenge to the economic impact

statement for the rule are limited to an agency's failure to adhere to the procedure for preparation of an economic impact statement provided by this section, or an agency's failure to consider information submitted to the agency regarding specific concerns about the economic impact of a proposed rule when such failure substantially impairs the fairness of the rulemaking proceeding.

77. Effective July 1, 1992, an agency is no longer required to prepare an EIS for every proposed rule (Chapter 92-166, subsection 4, 12, Laws of Florida).

The agency prepared an appropriate detailed EIS when the June 1992 version of the rules was published. For the October version it did not consider that the requirements of Section 120.54(2)(b)1, F.S. were met. In addition, no EIS was requested for the October 1992 version.

78. In fact, the agency's consultant, Dr. Lynch, continued to compile information on the affect of the October amendments and discussed that information with agency staff. The fact that his findings are in a "work in progress" rather than a final formal EIS does not detract from the agency's proper consideration of the impact of the amendments.

The agency has not violated section 120.52(8)(a), F.S. or "materially failed to follow the applicable rule-making procedures set forth in Section 120.54".

ORDER

Based on the foregoing, the following proposed rules are determined to be invalid: 4-223.003(2); 4-223.006(2)(d); 4-223.006(2)(h)5.(i); 4-223.011(4)(a)3.; and 4-223.011(4)(c).

DONE AND ORDERED this 30th day of July, 1993, in Tallahassee, Florida.

/s/ Mary Clark
MARY CLARK
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the Division of Administrative Hearings this 30th day of July, 1993.

APPENDIX

Pursuant to Section 120.59(2), F.S., the following constitute specific rulings on the findings of fact proposed by the parties:

*Findings of Fact Proposed by
GNA and FNB*

- 1.-3. Adopted in paragraph 2.
- 4.-8. Rejected as irrelevant, immaterial or unnecessary.
- 9.-10. Adopted in paragraph 2.
- 11. Adopted in substance in paragraph 35.
- 12.-14. Rejected as irrelevant, immaterial or unnecessary.

APPENDIX B

**Legislative History of § 626.988. House Bill submitted by
Representative Brown and others. State of Florida
Archives, Series 19, Carton 186.**

By Representatives Drove and others

A bill to be entitled

An act relating to insurance; creating § 626.988, Florida Statutes; prohibiting insurance agents and solicitors associated with certain financial institutions from soliciting, negotiating, selling, effectuating or servicing any policy of insurance; providing exceptions with respect to certain types of insurance and certain agents and solicitors so engaged on April 2, 1974; providing an effective date.

WHEREAS, there is now pending before the Board of Governors of the Federal Reserve System various applications by bank holding companies to engage in the insurance agency business, and

WHEREAS, an administrative law judge has prepared a recommended decision for consideration by the Federal Reserve Board which enumerates the anticipated adverse effects on the public of the entry of bank holding companies into insurance agency activities, but recommends that the applicants to be authorized to engage in such activities in a limited manner and subject to various restrictions, and

WHEREAS, after hearing an exhaustive presentation of evidence, the administrative law judge reached various conclusions concerning the bank holding company applicants, among them are the following:

- a) "... [T]he entry of large banking institutions into the insurance agency business in areas where the banks have a large concentration of

resources would result in the demise of small insurance agencies or their transformation into large combinations. This would decrease competition within the insurance industry and reduce the opportunity for youths, veterans and women to gain a foothold in a business in which ultimately they could participate as owners or managers."

- b) "... [W]hile there is a minor convenience in bank affiliated insurance agency sales in the case of personal lines such as automobile and homeowner's coverages, the convenience advantage in the case of commercial financing—insurance appears insignificant."
- c) "... [I]t appears that the gains in efficiency [by] the bank affiliated insurance agencies will largely benefit the applicants in terms of larger-scale operating economies," and "Based upon their record of maximum charges for credit life insurance it is not reasonable to expect that the applicants will voluntarily lower premiums in other fields of insurance."
- d) "... [W]hile it is difficult to accurately measure the psychology of voluntary tying, nevertheless the weight of evidence realistically evaluated suggests that in times of scarcity of lending funds, the average borrower finds himself in a weakened bargaining position vis-a-vis the lender and the offer of insurance placement is another device along with compensating balances and utilization of other banking services with which the borrower can increase the probability that a needed loan will be granted."
- e) "... [S]ince banks are predominantly the depositories of 'other peoples' money, 'therefore they should not be in competition with their depositors,'"

and,

* * *

WHEREAS, the undue concentration of economic resources, a substantial decrease in competition among insurance agents, unfair competition, conflicts of interest and voluntary tying are against the public policy of the state and against the best interests of the people of Florida, and

WHEREAS, other financial institutions which enter insurance agency activities will cause the same results as the entry of bank holding companies into such activities, and

WHEREAS, the United States Congress by the Federal Bank Holding Act of 1956, 12 USCA § 1846, specifically reserved to the states the power and authority to enact legislation with respect to bank holding companies, and

WHEREAS, to preserve the public policy and protect the public interest insurance agents and solicitors should be prohibited from soliciting, negotiating and selling insurance contracts if employed by, associated or affiliated in any way with specified institutions. NOW THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 626.988, Florida Statutes, is created to read 626.988 Financial institutions; agents and solicitors prohibited from employment; exceptions.—

(1) For the purpose of this section the following definitions shall apply:

(a) "Financial institution" means any bank, bank holding company, savings and loan association, savings and loan association holding company, savings and loan association service corporation, and any subsidiary, affiliate, employees' trust or foundation of any of the foregoing. [insert amendment #3 here] Specifically excluded from this definition in any bank which is not a subsidiary or

affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census.

(b) "Insurance agency activities" means the procurement of applications, solicitation, negotiation, selling, effectuating or servicing of any policy or contract of insurance other than credit life insurance and credit disability insurance.

(c) "Financial institution agency" means any person, firm, partnership or corporate entity which is engaged in insurance agency activities, as herein defined, and is associated with, owned, controlled, employed or retained by a financial institution as herein defined.

(2) No insurance agent or solicitor licensed by the department of insurance under the provisions of Chapter 626, Florida Statutes, who is associated with, under contract with, retained by, or owned or controlled to any degree directly, or indirectly, or who is employed by a financial institution shall engage in insurance agency activities as an employee, officer, director, agent or associate of a financial institution agency.

(3) The department of insurance shall not grant, renew, continue or permit to exist any license as such agent or solicitor as to any applicant therefor or licensee thereunder if it finds that the license has been or is being or will probably be used by the applicant or licensee for any purpose prohibited by this section.

(4) Notwithstanding any provision of this section the department of insurance shall permit the continued operation under the same ownership and control of all financial institution agencies which were in existence and engaged in insurance agency activities as of April 2, 1974. To make possible such continuation the department of insurance may license agents and solicitors who are otherwise qualified, as successors to those agents and solicitors who are exempt from the provisions of this section, and their

successors, for so long as the specified financial institution agency continues to function as it was constituted on April 2, 1974; provided, however, that no agent or solicitor so licensed under this section shall be permitted to be employed, or controlled to any degree, directly, or indirectly, by any financial institution agency except the particular agency for which he was so licensed as a successor for the purposes of this section.

(5) This section shall not prevent an agent or solicitor from serving as an officer or director of a financial institution, provided that he conducts all of his insurance activities free of ownership or control of the financial institution, and, provided further that the financial institution does not participate directly or indirectly in the earnings from his insurance activities.

(6) This section shall not apply to agents or solicitors who were engaged as of April 2, 1974, in activities prohibited by this section and who have been continuously so engaged since that date, but only with respect to the specific type of license held and the financial institution with which the agent or solicitor was associated on said date.

Section 2. This act shall take effect upon becoming a law.

LEGISLATIVE SUMMARY

Provides that no insurance agent or solicitor associated with, under contract with, retained by or owned or controlled by a financial institution shall engage in insurance agency activities. Provides that the department of insurance shall not grant, renew or permit any license to such agent. Provides that the department of insurance shall allow the continued operation under the same ownership and control of all financial institution agencies which were in existence and engaged in insurance agency activities as of January 1, 1974. Provides that an insurance agent or solicitor may act as a director or officer of a financial institution provided his insurance activities are separate from the financial institution. Exempts agents or solicitors engaged in prohibited activities prior to January 1, 1974 and continuously so engaged since that date.

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No. 94-1837

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,

v.

BILL NELSON, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

**BRIEF OF AMERICAN DEPOSIT CORP.,
BLACKFEET NATIONAL BANK, AND
INDEPENDENT BANKERS ASSOCIATION
OF TEXAS AS AMICI CURIAE
IN SUPPORT OF PETITIONER**

Of Counsel:

KAREN M. NEELEY
General Counsel
INDEPENDENT BANKERS
ASSOCIATION OF TEXAS
408 West 14th Street
Austin, Texas 78701-1691
(512) 474-6889

THADDEUS HOLT
Counsel of Record
DENNIS M. GINGOLD
1201 Pennsylvania Ave., N.W.
Suite 821
Washington, D.C. 20004
(202) 662-6775

*Attorneys for Amici Curiae
American Deposit Corp.,
Blackfeet National Bank
and Independent Bankers
Association of Texas*

November 9, 1995

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QUESTION PRESENTED

These amici curiae adopt the statement of the question presented by petitioner.

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IN THE
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**BRIEF OF AMERICAN DEPOSIT CORP.,
BLACKFEET NATIONAL BANK, AND
INDEPENDENT BANKERS ASSOCIATION
OF TEXAS AS AMICI CURIAE
IN SUPPORT OF PETITIONER**

American Deposit Corp., Blackfeet National Bank, and Independent Bankers Association of Texas file this brief as amici curiae pursuant to written consents of the petitioner and respondents which have been lodged with the Clerk.

I. INTEREST OF THE AMICI CURIAE

Amicus American Deposit Corp. ("ADC") owns and licenses to banks, including national banks, a new proprietary banking product called the "Retirement CD."¹ In highly simplified form, the Retirement CD

works as follows: The customer deposits money with the bank and selects a "maturity date" in the future—normally the customer's anticipated retirement date. The deposited funds are booked as deposits and are used in the bank's normal operations, and FDIC insurance premiums are paid on them. Interest accumulates and is added to the account until the maturity date, at which time the depositor may withdraw up to two-thirds of the account balance. Thereafter, the depositor receives monthly (or other periodic) payments for life, their amount being determined with reference to mortality tables and an interest rate. The depositor is assured of receiving withdrawals totaling the amount of the maturity balance; if he dies before doing so, his estate or designated beneficiary is paid the remaining amount.

The Office of the Comptroller of the Currency ("OCC"), the regulatory agency for national banks, has confirmed that national banks have authority to issue the Retirement CD under their *express* statutory powers under the National Bank Act, 12 U.S.C. § 24, to accept deposits and fund their operations,¹ and the Federal Deposit Insurance Corporation ("FDIC") has ruled that the Retirement CD qualifies as an insured deposit under the Federal Deposit Insurance Act.

While the Retirement CD is an attractive product for all banks, it is of particular value to small community banks, for it provides them with a much-needed source of stable long-term deposits from which the credit needs of local business and community development can be met. Amicus Blackfeet National Bank, a small national bank in Browning, Montana, on the Blackfeet Indian Reservation owned by the

¹ The Retirement CD is thus *not* a mere "incidental power" of national banks. See *NationsBank v. VALIC*, 115 S.Ct. 810, 814 n.2 (1995) (hereinafter "*NationsBank*").

Blackfeet Indian Tribe and its members, is one of ADC's licensees. Amicus Independent Bankers Association of Texas is an association of approximately 800 independent community banks in Texas. Its wholly-owned subsidiary, IBAT Services, Inc., has licensed the Retirement CD for its members.

Life insurance companies have long issued annuities as well as writing life insurance.² Until recently, however, for life insurance companies annuities were a sideline to their insurance business (along with other sidelines such as lending money, *NationsBank*, 115 S.Ct. at 815). See, e.g., 1 APPLEMAN & APPLEMAN, *INSURANCE LAW AND PRACTICE* § 81, at 285-86 (1981) ("The volume of insurance written annuities is presently negligible."). Of late, however, issuing annuities has become important to the life insurance industry because their traditional central

² Many other entities besides life insurance companies have long issued annuities. Governments have issued them since the Middle Ages; the famous British "Consols" (short for "Consolidated Annuities") formed the larger part of the British government's funded debt until World War I. The beginning of modern banking with the founding of the Bank of England in 1694-95 was intimately associated with annuities: the Bank's original capital was a subscription to a government annuity. See HOMER & SYLLA, *A HISTORY OF INTEREST RATES* 75-76, 101, 108, 112, 128, 135, 150, 159-62 (3d ed. 1991). Eleemosynary institutions have issued annuities at least since the 1830s, when the American Bible Society began its planned giving program. 141 CONG. REC. S9306 (June 28, 1995) (speech of Senator Hutchinson of Texas in support of S. 978, the Charitable Giving Protection Act of 1995). There exists an association called the American Council on Gift Annuities, numbering in its membership such entities as United Way of America, the Salvation Army, Vassar College, the General Conference of Seventh-Day Adventists, the Southern Baptist Convention, and some 1500 other charities, which issue annuities in the hundreds of millions of dollars each year. *Ibid.*; and see *Charities That Offer Gift Annuities Catch Flak for Uniform Rates*, WALL ST. JOURNAL, October 5, 1995, p. A1.

business has declined in attractiveness. "People are living longer . . . and consumers' concerns have shifted from death at a young age to death at such an old age that savings might be exhausted. Thus sales of annuities, which promise a stream of future payments as long as you live, are growing rapidly while sales of new life policies with an investment feature are stagnant." *Could This Be You? That's the Pitch, As Insurers Revive Focus on Death*, NEW YORK TIMES, September 28, 1995, D1; see also *Retired, Finally, But Still Saving for Tomorrow*, NEW YORK TIMES, October 1, 1995, 1 at 11.

The Retirement CD has obvious annuity features and is competitive with annuities issued by life insurance companies. The life insurance industry has accordingly fought it bitterly. Three different state insurance commissioners (those of New Mexico, Illinois, and Florida) have attacked ADC's national bank licensees, asserting that solicitation or acceptance of Retirement CD deposits from their citizens constituted violations of their insurance codes. Their argument has been that under their state laws the Retirement CD is an annuity; that under those laws only insurance companies can issue annuities; and that the "reverse preemption" of McCarran-Ferguson therefore enables them to forbid national banks from engaging in this activity even though the Comptroller of the Currency has confirmed that it is authorized under the express powers conferred by the National Bank Act.

In each case, ADC and the affected national banks filed suit under 42 U.S.C. § 1983 to put an end to the state insurance commissioners' interference with the banks' federally secured rights, contending *inter alia* that as an authorized activity under the express powers of the National Bank Act, the Retirement CD cannot be prohibited or regulated by the states, and that McCarran-Ferguson does not reverse this preemption

because "the business of insurance" under McCarran-Ferguson does not include the business of issuing annuities. After this Court's decision in *NationsBank v. VALIC*, 115 S.Ct. 810 (1995), the New Mexico authorities recognized that annuities are not "insurance" within the meaning of McCarran-Ferguson and consented to judgment against them. *First National Bank of Santa Fe v. Chavez*, CIV 94-1272 JB/WWD (D. N.M.). The Illinois case, *American Deposit Corp. v. Schacht*, 887 F. Supp. 1066 (N.D. Ill. 1995) (magistrate judge's opinion) is on appeal in the Seventh Circuit (7th Cir. No. 95-2462). The Florida case, *Blackfeet Nat'l Bank v. Nelson*, No. TCA 94-40496-WS (N.D. Fla. Aug. 8, 1995), is under petition for reconsideration.³

Amici thus have a direct and immediate interest in several questions presented by the case at bar. In addition, we will invite the Court's attention to two matters that we respectfully submit should be kept in mind in drafting the opinion in the case at bar.

II. SUMMARY OF ARGUMENT

Amici support the principal arguments of petitioner herein. Amici further urge that the Court recognize that notwithstanding the apparently all-embracing language of McCarran-Ferguson, there are some areas of federal legislation that Congress cannot conceivably

³ See also *Blackfeet National Bank v. Rubin* (D.C. Cir. No. 95-5206), involving a Treasury rulemaking proceeding proposing to deprive the Retirement CD of tax-deferred status during the accumulation phase, thus crippling its ability to compete with insurance-company-issued annuities. That case involves major issues of ripeness for review and the propriety of *ex parte* contacts by the life insurance industry but does not raise questions relevant to the case at bar. On November 2 the court of appeals denied rehearing *en banc* of its affirmance of dismissal on ripeness grounds. Blackfeet and ADC have not decided whether to file a petition for certiorari.

have intended to turn over to the states and that the National Banking Act is one of these. Amici also urge that the Court put an end to the argument that the test for whether a practice falls within the "business of insurance" which it enunciated in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982), is limited to antitrust cases. Finally, amici note that the questions (a) whether annuities are "insurance" for McCarran-Ferguson purposes, and (b) whether national banks may issue annuities (as opposed to selling annuities issued by others) are not involved in the case at bar and that nothing need be said in any opinion herein that could be interpreted as passing on those questions.

III. ARGUMENT

A. Amici Support Basic Arguments of Petitioner

Amici of course support the proposition that states cannot preclude or impede the exercise by national banks of powers Congress has expressly conferred on them.

Amici also support the proposition that a state statute that forbids engaging in an activity is not a statute "regulating" that activity.

B. McCarran-Ferguson Should Not Be Read To Authorize State Preemption of the National Bank Act

We submit that, notwithstanding the sweeping language of McCarran-Ferguson, Congress could not have really intended to allow the states to preempt every federal statute that does not "specifically relate [] to the business of insurance." There are statutes that deal with matters of such "paramount importance," *Moore v. National Distillers and Chemical Corp.*, 143 F.R.D. 526, 534 (S.D.N.Y. 1992) (magistrate judge's decision), to the national interest that Congress cannot conceivably have meant to turn them over to the states.

The Civil Rights Act of 1964 does not "relate to insurance"; but could a state's insurance code really be allowed to override it? Compare *Spirit v. Teachers Ins. and Annuity Assoc.*, 691 F.2d 1054, 1065 (2d Cir. 1982), with *NAACP v. Family Mut. Ins. Co.*, 978 F.2d 287, 299 (7th Cir. 1992), cert. denied, 113 S. Ct. 2335 (1993). Or the Civil Rights Act of 1866? Cf. *Ben v. General Motors Acceptance Corp* 374 F. Supp. 1199 (D. Colo. 1974). Could a state authorize a domestic company to insure enemy vessels in wartime notwithstanding the Trading With the Enemy Act? Surely not. And see *Moore v. National Distillers and Chemical Corp.*, supra (though Foreign Sovereign Immunities Act nowhere relates to business of insurance, McCarran-Ferguson preemption inapplicable in view of paramount importance of U.S. foreign policy concerns embodied in the FSIA).

We submit that the National Bank Act is such a statute, and that the Eighth Circuit was correct in holding that McCarran-Ferguson preemption should not be applied to it, because the longstanding exclusive federal regulation of national banks prior to McCarran-Ferguson "strongly indicates that Congress did not intend the 'business of insurance' to encompass lawful activities of national banks." *First Nat. Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 780 (8th Cir. 1990).

C. The Pireno Test Is Not Limited to Antitrust Cases

The brief of respondent Insurance Agents in opposition to the petition suggested, at p. 8, that the familiar threefold test for whether a practice is part of the "business of insurance" which this Court articulated in *Union Labor Life Ins. Co. v. Pireno*, 458

U.S. 119, 129 (1982),⁴ is somehow limited to antitrust cases, citing *United States Dep't of the Treasury v. Fabe*, 113 S. Ct. 2202 (1993). (The insurance agents have previously advanced this argument in litigation over the Retirement CD.) But this is not what *Fabe* held. *Fabe* simply pointed out that a statute is "enacted for the purpose of regulating the business of insurance" if it "possesses the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." 113 S. Ct. at 2210. Holding that the performance of an insurance contract passes the *Pireno* test and therefore is part of the business of insurance, *id.* at 2209, the court concluded that therefore a statute "aimed at protecting or regulating such performance was a law enacted for the purpose of regulating the business of insurance." *Id.* at 2210. The Ninth Circuit expressly rejected the Insurance Agents' argument in *Merchants Home Delivery Service, Inc. v. Reliance Group Holdings, Inc.*, 50 F.3d 1487, 1490 (9th Cir. 1995). See also *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) (*Pireno* applied in non-antitrust action); *Kenty v. Bank One Columbus, N.A.*, No. 93-4211 (6th Cir. Oct. 25, 1995), 1995 Fed. App. 316 (same).

D. Miscellaneous Points

Finally, we respectfully invite the Court's attention to two points that have arisen in the Retirement CD litigation but are not here involved, so as to ensure that the Court's opinion in this case will not inadvertently appear to decide them.

⁴ "[F]irst, whether a practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry."

1. Annuities Are Not Insurance.

Whether annuities fall within the "business of insurance" is of course central to the question of McCarran-Ferguson and the Retirement CD. In the view of ADC and its licensees, it is plain that (absent a special statutory definition) annuities were not deemed "insurance" when McCarran-Ferguson was passed and are not so deemed today. Besides this Court's opinion in *NationsBank, supra*, 115 S. Ct. at 815, quoting with approval the categorical statement of the standard treatise that "Annuity contracts must . . . be recognized as investments rather than insurance," 1 APPLEMAN & APPLEMAN, INSURANCE LAW AND PRACTICE § 84 (Rev. ed. 1981), there are literally scores of cases to this effect, going back well into the nineteenth century. We will not burden this short brief with citations⁵ but will simply repeat that there is no need to touch on this matter in the opinion in the case at bar.

2. Bank as Agent Versus Bank as Issuer.

The Court's footnote in *NationsBank*, 115 S.Ct. at 815 n.4,⁶ has been cited in briefs in the Retirement CD litigation as if it showed the Court's disapproval of any issuance of annuities by banks as principal. We think that this is an overreaching misconstruction and that the Court plainly was merely noting that the issuance of annuities by the bank as a principal was simply not involved in that case, which dealt with the bank's acting

⁵ A large collection of cases will be found in the cited section of APPLEMAN, as well as in, e.g., 19 COUCH ON INSURANCE 2D § 81:2 (Rhodes ed. 1983), and 3A C.J.S. *Annuities* § 3c.

⁶ "Assuring that the brokerage in question would not deviate from traditional bank practices, the Comptroller specified that NationsBank 'will act only as agent, . . . will not have a principal stake in annuity contracts and therefore will incur no interest rate or actuarial risks.' Comptroller's Letter 48a."

as agent or broker to *sell* annuities issued by others, just as the case at bar deals with the bank's acting as agent to sell insurance policies. We respectfully suggest that the Court bear this misconstruction in mind in framing any discussion of bank agency in the case at bar.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

Of Counsel:

KAREN M. NEELEY
General Counsel
INDEPENDENT BANKERS
ASSOCIATION OF TEXAS
408 West 14th Street
Austin, Texas 78701-1691
(512) 474-6889

THADDEUS HOLT
Counsel of Record
DENNIS M. GINGOLD
1201 Pennsylvania Ave., N.W.
Suite 821
Washington, D.C. 20004
(202) 662-6775

*Attorneys for Amici Curiae
American Deposit Corp.,
Blackfeet National Bank,
and Independent Bankers
Association of Texas*

November 9, 1995

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,
 v.

TOM GALLAGHER, INSURANCE COMMISSIONER
 OF THE STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the
 United States Court of Appeals
 for the Eleventh Circuit

BRIEF IN SUPPORT OF PETITIONER AND SEEKING
 REVERSAL FILED BY *AMICI CURIAE* CONSUMER
 BANKERS ASSOCIATION, AMERICA'S COMMUNITY
 BANKERS, ARKANSAS BANKERS ASSOCIATION,
 GEORGIA BANKERS ASSOCIATION, MASSACHUSETTS
 BANKERS ASSOCIATION, MICHIGAN BANKERS
 ASSOCIATION, NEW MEXICO BANKERS ASSOCIATION,
 OHIO BANKERS ASSOCIATION, PENNSYLVANIA
 BANKERS ASSOCIATION, TENNESSEE BANKERS
 ASSOCIATION, VERMONT BANKERS ASSOCIATION,
 WESTERN INDEPENDENT BANKERS, CHASE
 MANHATTAN CORPORATION, CHEMICAL BANKING
 CORPORATION, FIRST INTERSTATE BANCORP,
 KEYCORP, SHAWMUT NATIONAL CORPORATION,
 AND WELLS FARGO & COMPANY

DAVID W. RODERER *
 ERIC L. HIRSCHHORN
 DONN C. MEINDERTSMA
 WILLIAM B.F. STEINMAN
 WINSTON & STRAWN
 1400 L Street, N.W.
 Washington, D.C. 20005-3502
 (202) 371-5700

Counsel for Amici Curiae

November 1995

* Counsel of Record

(Additional Counsel Listed on Inside Cover)

Of Counsel:

MARCIA Z. SULLIVAN
CONSUMER BANKERS ASSOCIATION
1000 Wilson Boulevard
Suite 3012
Arlington, Virginia 22209

PHILIP GASTEYER
AMERICA'S COMMUNITY BANKERS
900 19th Street, N.W., Suite 400
Washington, D.C. 20006

ARKANSAS BANKERS ASSOCIATION
The Carvill Building
1220 W. Third Street
Little Rock, Arkansas 72201

GEORGIA BANKERS ASSOCIATION
50 Hurt Plaza, Suite 1050
Atlanta, Georgia 30303

MASSACHUSETTS BANKERS
ASSOCIATION
73 Tremont Street, Suite 306
Boston, Massachusetts 02108

DONALD HEIKKINEN
MICHIGAN BANKERS ASSOCIATION
222 North Washington Square
Suite 3209
Lansing, Michigan 48933

JOHN W. ANDERSON
NEW MEXICO BANKERS
ASSOCIATION
P.O. Box 90880
Albuquerque, New Mexico 87109

JEFFREY D. QUAYLE
OHIO BANKERS ASSOCIATION
27 West Broad, Suite 1001
Columbus, Ohio 43215

LOUISE A. RYND
PENNSYLVANIA BANKERS
ASSOCIATION
P.O. Box 152
Harrisburg, Pennsylvania 17108

TIMOTHY L. AMOS
TENNESSEE BANKERS
ASSOCIATION
210 Venture Circle
Nashville, Tennessee 37228

VERMONT BANKERS ASSOCIATION
29 Main Street
Montpelier, Vermont 05601

WESTERN INDEPENDENT BANKERS
100 Spear Street
Suite 1505
San Francisco, California 94105

JULIUS L. LOESER
FIRST INTERSTATE BANCORP
633 West 5th Street, Suite 700
Los Angeles, California 90071

DENNIS W. TOIVONEN
CHASE MANHATTAN
CORPORATION
2 Chase Plaza, 10th Floor
New York, New York 10081

ARTHUR T. GUJA
CHEMICAL BANKING
CORPORATION
270 Park Avenue, 41st Floor
New York, New York 10017

WILLIAM BLAKE
KEYCORP
127 Public Square
Law Group, Second Floor
Cleveland, Ohio 44114

J. MICHAEL SHEPHERD
SHAWMUT NATIONAL
CORPORATION
1 Federal Street, OF0905
Boston, MA 02211

JOHN D. WRIGHT
WELLS FARGO & COMPANY
111 Sutter Street, 20th Floor
San Francisco, CA 94136

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1837

BARNETT BANK OF MARION COUNTY, N.A.,
v. *Petitioner,*

TOM GALLAGHER, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, *et al.,*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF IN SUPPORT OF PETITIONER AND SEEKING
REVERSAL FILED BY *AMICI CURIAE* CONSUMER
BANKERS ASSOCIATION, AMERICA'S COMMUNITY
BANKERS, ARKANSAS BANKERS ASSOCIATION,
GEORGIA BANKERS ASSOCIATION, MASSACHUSETTS
BANKERS ASSOCIATION, MICHIGAN BANKERS
ASSOCIATION, NEW MEXICO BANKERS ASSOCIATION,
OHIO BANKERS ASSOCIATION, PENNSYLVANIA
BANKERS ASSOCIATION, TENNESSEE BANKERS
ASSOCIATION, VERMONT BANKERS ASSOCIATION,
WESTERN INDEPENDENT BANKERS, CHASE
MANHATTAN CORPORATION, CHEMICAL BANKING
CORPORATION, FIRST INTERSTATE BANCORP,
KEYCORP, SHAWMUT NATIONAL CORPORATION,
AND WELLS FARGO & COMPANY

Pursuant to Rule 37.3 of the Rules of this Court,
amici curiae file this brief in support of Petitioner, Barnett
Bank of Marion County, N.A., seeking reversal of the

judgment of the Court of Appeals for the Eleventh Circuit. All parties have consented to the filing of this brief and their written consents have been filed with the Clerk.

Florida law purports to prohibit certain national banks from selling insurance. In addition to its anticompetitive effect, the Florida statute at issue contravenes express statutory authorization in the National Bank Act for national banks, including the Petitioner, to sell insurance. Because the Florida law directly conflicts with the National Bank Act, the Florida law would be invalid under traditional preemption analysis. The general language of the McCarran-Ferguson Act, which allows states to regulate the "business of insurance" except where Congress specifically provides otherwise, does not vitiate the preemptive force of the express authorization in the National Bank Act. For these reasons, the judgment of the court of appeals that Florida may prohibit a national bank from selling insurance should be reversed.

INTEREST OF THE *AMICI CURIAE*

Amici have a direct interest in ensuring that national banks are permitted to continue to engage in sales of insurance to the full extent authorized by federal law. *Amici* are national, regional, and state banking associations whose members include banks and savings associations throughout the United States. *Amici* also include financial institutions that engage—directly or through affiliated institutions—in the sale of insurance products.

Three national and regional associations join this brief on behalf of their members. Consumer Bankers Association, America's Community Bankers, and Western Independent Bankers represent nearly 3000 banks and savings associations of all sizes that engage in diverse insurance activities as authorized by Congress. These associations and their members have a direct interest in preserving such activities from restrictive and anticompetitive state laws. Laws of the states in which other members of these

associations operate preclude those members from conducting congressionally authorized insurance activities by prohibiting licensure of such activities. Descriptions of these associations follow:

The *Consumer Bankers Association* (CBA) was founded in 1919 to provide a progressive voice for the retail banking community. CBA represents over 750 federally insured banks and thrift institutions that hold more than eighty percent of all consumer deposits and more than seventy percent of all consumer credit held by federally insured depository institutions in the United States.

America's Community Bankers (ACB) is the national trade association for over 1800 savings and community financial institutions, serving communities in every state. Members are federally and state chartered, stock and mutual in ownership, and FDIC-insured. The industry members that ACB represents have more than \$1 trillion in assets, 270,000 employees, and 16,000 offices. Many of ACB's member banks have long provided the public with insurance products and services through related entities under a variety of corporate structures.

Western Independent Bankers (WIB) is the only regional multistate banking association in the United States. Its members consist of 250 independent community banks located in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming, as well as American Samoa and Guam. WIB's members account for more than \$34 billion in banking assets.

Nine statewide banking associations also join in this brief. Each state represented by these associations has enacted legislation purporting to prohibit or severely circumscribe the ability of banks, including national banks, to market insurance products. Each state association is described below:

Arkansas Bankers Association has represented Arkansas banks and bank holding companies for 104 years. The

primary objective of the Association is to provide a forum for the financial community to address issues of state and national importance to the business of banking so as to promote a positive banking environment for member banks and customers.

Georgia Bankers Association (GBA) is the statewide association representing commercial banks in the State of Georgia. GBA's members collectively account for virtually all of the banking assets in the state.

Massachusetts Bankers Association is a statewide association representing 192 banks and savings associations in the Commonwealth of Massachusetts. Its members account for \$150 billion in banking assets.

Michigan Bankers Association has represented Michigan commercial banks and bank holding companies for over 100 years. It represents approximately 200 commercial banks in Michigan, which collectively account for virtually all of the banking assets in the state.

New Mexico Bankers Association is the principal state trade association for the banking community in New Mexico. Its membership consists of sixty-nine banks and savings institutions, which collectively account for over ninety percent of banking assets in New Mexico.

Ohio Bankers Association is the principal state trade association representing 235 commercial banks in Ohio. Its members range in size from small community banks to large regional institutions.

Pennsylvania Bankers Association (PBA) is the trade association representing approximately 250 commercial and savings banks in the Commonwealth of Pennsylvania. PBA's members hold ninety-nine percent of the commercial banking assets in Pennsylvania.

Tennessee Bankers Association (TBA) is the principal trade association for commercial banks, savings banks, savings associations, and trust companies in Tennessee.

All 249 state and federally chartered banks and trust companies in Tennessee, plus all twenty-seven state and federally chartered savings institutions in the state, are members of TBA.

Vermont Bankers Association (VBA) represents twenty-eight commercial banks and savings associations in Vermont. VBA provides legislative, regulatory and educational services to its members.

In addition to the above-named banking associations, Chase Manhattan Corporation, Chemical Banking Corporation, First Interstate Bancorp, KeyCorp, Shawmut National Corporation, and Wells Fargo & Company join in this brief as *amici*. These institutions have a direct interest in exercising the full range of powers granted to national banks by Congress.

Chase Manhattan Corporation is headquartered in New York, New York and operates two subsidiary banks with 304 consumer branches in three eastern states. It has total assets of \$118.8 billion.

Chemical Banking Corporation is headquartered in New York, New York and operates seven subsidiary banks with 458 branches in seven eastern states. It has total assets of \$187.9 billion.

First Interstate Bancorp is headquartered in Los Angeles, California and operates fourteen subsidiary banks with 1167 branches in thirteen western states. It has total assets of \$56.9 billion.

KeyCorp operates 15 commercial bank subsidiaries in fourteen states, with more than 1400 branch and affiliate offices in twenty-five states.

Shawmut National Corporation is headquartered in Boston, Massachusetts and operates five subsidiary banks with 364 branches in six states. It has total assets of \$34 billion.

Wells Fargo & Company is headquartered in San Francisco, California and operates two banking subsidiaries

with 861 branches in two states. It has total assets of \$51 billion.

SUMMARY OF ARGUMENT

In 1864 Congress enacted the National Bank Act,¹ establishing our modern national banking system. Among other things, the National Bank Act created a federal regulatory structure for national banks. The act authorizes and directs the Comptroller of the Currency to charter and supervise the affairs of the national banks. The congressional design for the governance of the national banking system, which has been refined by numerous enactments over the years, delineates with care the limited role that the states may play with regard to such associations. This Court consistently has held that the states may neither frustrate the National Bank Act nor impair the functioning of national banks.

In 1916 the Congress specifically authorized national banks located in small communities to sell insurance. 12 U.S.C. § 92² ("Section 92"). Section 92 expressly provides that the Comptroller of the Currency is to prescribe rules and regulations governing sales of insurance by national banks.

The State of Florida has enacted a statute that purports to prohibit certain national banks empowered by Section 92 to sell insurance—including the Petitioner—from doing so. Fla. Stat. Ann. § 626.988(2) (West 1984 & Supp. 1995). Florida's attempt to prohibit national banks from exercising such authority squarely conflicts with Section 92.

Florida seeks to avoid the preemptive effect of Section 92 by invoking Section 2(b) of the McCarran-Ferguson Act ("McCarran-Ferguson"), 15 U.S.C. § 1012(b), which

¹ Act of June 3, 1864, ch. 106, 13 Stat. 99. This statute reenacted and amended the Currency Act of 1863, Act of Feb. 25, 1863, ch. 58, 12 Stat. 665.

² All citations herein to the United States Code are to the 1994 edition unless otherwise noted.

Florida asserts deprives Section 92 of preemptive force. The court of appeals erroneously accepted Florida's argument. Pet. App. 1a-16a. The history of the federal banking system, the text of its underlying statutory scheme, and the language, history, and purpose of McCarran-Ferguson demonstrate that Congress did not intend McCarran-Ferguson to diminish federal authority, or enhance state authority, over the activities of national banks.

Nothing about McCarran-Ferguson evinces a congressional purpose to alter the carefully crafted balance of authority between federal and state governments under the national banking scheme. Rather, Congress carefully fashioned the two-pronged test of Section 2(b) of McCarran-Ferguson to ensure that federal statutes expressly affecting insurance, such as Section 92, would remain unimpaired. Section 92 explicitly authorizes national banks to sell insurance. Accordingly, that law "specifically relates to the business of insurance" and is not subject to McCarran-Ferguson. The need to maintain the integrity and competitiveness of the national banking system, as well as to harmonize the congressional policy detailed in Section 92 with the limited congressional purpose reflected in McCarran-Ferguson, require that the decision of the court of appeals be reversed.

ARGUMENT

I. THE McCARRAN-FERGUSON ACT WAS NOT INTENDED TO RESTRICT THE POWERS OF NATIONAL BANKS.

A. The Activities Of National Banks, Including Their Sales Of Insurance, Are Regulated By A Pervasive Federal Statutory Scheme.

National banks are creatures of federal law. *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 823 (1824). Congress possesses broad constitutional powers to charter banks, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), and to maintain a national banking system, *Norman v. B. & O. R.R. Co.*, 294 U.S.

240, 303 (1935). Congress devised the modern national banking system during the Civil War to provide a national currency and a federal banking system separate from the previous state-dominated system. See Act of Feb. 25, 1863, ch. 58, 12 Stat. 665; Act of June 3, 1864, ch. 106, 13 Stat. 99 (collectively referred to herein as the National Bank Act). As an essential element of the National Bank Act, Congress fashioned a federal framework to regulate the chartering and supervision of national banks. Congress placed the Comptroller of the Currency at the helm of that scheme. See, e.g., 12 U.S.C. § 1.

"The National Bank Act constitutes 'by itself a complete system for the establishment and government of National Banks.'" *Deitrick v. Greaney*, 309 U.S. 190, 194 (1940) (quoting *Cook County Nat'l Bank v. United States*, 107 U.S. 445, 448 (1883)). National banks are organized under federal law, 12 U.S.C. §§ 21-23, which empowers them to conduct their corporate affairs, e.g., 12 U.S.C. §§ 24, 29 (power to hold real property); see generally *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810 (1995) ("*NationsBank*"). Inter alia, federal law sets the number and qualifications for directors, 12 U.S.C. §§ 71-78, determines the extent to which national banks may engage in branching, 12 U.S.C. § 36, and establishes dissolution and receivership requirements, 12 U.S.C. §§ 181-200.

The Comptroller, who is appointed by the President and confirmed by the Senate, 12 U.S.C. § 2, supervises the activities of national banks. *NationsBank*, 115 S. Ct. at 813; *United States v. Weitzel*, 246 U.S. 533, 540 (1918); *United States v. Corbett*, 215 U.S. 233, 240 (1909) (referring to the Comptroller's "comprehensive powers" over "the operations of national banks"). The Comptroller has plenary power, unimpeded by state laws, to charter national banks. After assessing a national bank association's financial condition, including whether the association's capital is sufficient, the Comptroller may

certify the association to commence business. 12 U.S.C. §§ 26-28; see generally 12 U.S.C. §§ 51-67 (provisions governing national bank capital, stock, and stockholders).

Each national bank must submit to the Comptroller reports concerning its condition, the dividends declared or paid, and the condition of the bank's affiliates. 12 U.S.C. §§ 161, 164. The Comptroller has general rule-making power to regulate national bank activities, 12 U.S.C. § 93a, may set limitations and conditions on the making of certain loans by national banks, 12 U.S.C. § 371(a), appoints examiners to examine the affairs of national banks, 12 U.S.C. §§ 481-482, may appoint and discharge conservators, 12 U.S.C. §§ 201-209, may approve national bank association consolidations, 12 U.S.C. § 215(a), and may impose regulatory sanctions and civil penalties for violations of banking laws or regulations, 12 U.S.C. § 1818. The Comptroller reports annually to Congress on these activities. 12 U.S.C. § 14.

In addition to their general powers to conduct the business of banking and incidental activities, see 12 U.S.C. § 24 (Seventh); *NationsBank*, 115 S. Ct. 810, national banks may engage in various banking and related activities specifically determined by Congress to be appropriate. Congress has constitutional authority to grant national banks any powers, including trust and agency powers, that are "appropriate or relevant to the banking business." *First Nat'l Bank v. Fellows ex rel. Union Trust Co.*, 244 U.S. 416, 420 (1917).

Congress in 1916 expanded national bank powers by enacting Section 92, which authorizes national banks located in small towns to sell insurance and empowers the Comptroller to regulate this activity. Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753. Section 92 provides:

In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population

of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided, however*, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

12 U.S.C. § 92. A central purpose of Section 92 was to "enlarge" national bank powers, providing such institutions "with additional sources of revenue and plac[ing] them in a position where they could compete with local state bank and trust companies." Letter from J. Skelton Williams, Comptroller of the Currency, to Sen. Robert L. Owen (June 8, 1916), *reprinted in* 53 Cong. Rec. 11001 (1916).

B. Florida May Not Interfere With The Authorized Operations Of National Banks Unless Authorized By Congress To Do So.

National banks operate outside the sphere of state regulation of the business of banking. The national banking system is to be "independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States." *First Nat'l Bank v. California*, 262 U.S. 366, 369 (1923) (quoting *Easton v. Iowa*, 188 U.S. 220, 229 (1903)).

This Court long has recognized that where the federal regulatory mechanism deals with activities of national banks, the states may not circumscribe those activities even in areas that normally might be considered matters of state concern. In *Easton v. Iowa* this Court held that because the National Bank Act established a mechanism to address the insolvency of a national bank, Iowa could not enforce a law penalizing a national bank's officers for accepting deposits during a period of insolvency.

Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; . . . Congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency [and] it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government.

Easton, 188 U.S. at 238.

A further illustration of the limited state power over national bank operations is the fact that state banking officials explicitly are precluded from reviewing national bank records except in narrowly restricted circumstances. See 12 U.S.C. § 484(b) (permitting state examinations only to ensure compliance with applicable state unclaimed property or escheat laws, and then only if the state has reasonable cause to believe that those laws have been violated); see also *Guthrie v. Harkness*, 199 U.S. 148, 159 (1905) ("It was the intention that this statute [Rev. Stat. § 5241] should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation."); 12 U.S.C. § 92a(c) (state banking authorities may review Comptroller's reports of ex-

amination of national banks insofar as the reports relate to the trust department of the bank but are not authorized by this provision to examine the books, records, or assets of the bank itself).

In general, state attempts to regulate national banks must fail when the state law conflicts with federal law, frustrates the congressional purpose underlying the federal banking statutes, or impairs the efficiency of national banks.

National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896). "General and undiscriminating" state laws are applicable to national banks, as to other businesses, so long as those laws do not impair the exercise by national banks of the powers Congress has entrusted to them. *Id.* at 290; *First Nat'l Bank v. Missouri*, 263 U.S. 640, 656 (1924); *McClellan v. Chipman*, 164 U.S. 347, 357 (1896).

But where Congress has granted national banks the right to exercise a particular power, or where national banks may engage in certain activities by virtue of the business they are empowered to conduct, a state cannot limit the ability of national banks to exercise that power unless Congress expressly has authorized the state to do so. On a few narrow and explicit occasions, Congress has done just that.

Branch banking is a notable example, particularly because at the same time the Senate considered Section 92—which does not provide for state-imposed limitations—it considered whether to permit state law to limit branching by national banks. The Senate version of the bill that enacted Section 92 also contained a provision designed to permit national banks to establish branches. *See S. Rep. No. 481, 64th Cong., 1st Sess. 8 (1916)*. During floor debate the Senate agreed to an amendment that would prohibit such branching "in any State whose statutes do not specifically authorize branches for banks having State charters." 53 Cong. Rec. 11153 (1916). Moments later the Senate took up the provision that ultimately became Section 92. *Id.* The lone issue discussed about the insurance sale provision was whether the threshold population figure should be 3000, as the Comptroller and the Senate Banking and Currency Committee had recommended, or 5000, as requested by Senator Nelson of Minnesota. *Id.* The latter figure was agreed to. *Id.* Thus the Senate, fresh from debate on imposing state law limitations on branch banking, considered Section 92 with not a single senator suggesting that this new power to act as insurance agent should be subject to state law restrictions. Although the branch banking provision was dropped in conference, S. Rep. No. 533, 64th Cong., 1st Sess. 7 (1916) (conference report), the state law limitation on branching was included when the McFadden Act authorized national banks to establish branches eleven years later. Act of Feb. 25, 1927, ch. 191, § 7, 44 Stat. 1225, 1228 (current version at 12 U.S.C. § 36).

Congress in other instances has authorized state law limitation on national bank powers. For example, Congress has provided that state laws limiting interest rates apply to national banks located in those states. 12 U.S.C. § 85; *see generally Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29 (1875) (discussing forerunners of 12 U.S.C. § 85). Congress intended some of these pro-

visions to ensure that national banks enjoy the same benefits that have been conferred by state legislatures on state banks. *E.g.*, 12 U.S.C. § 29 (providing that in certain circumstances, national banks may hold property for as long as a state-chartered bank would be permitted to do so under state law). Congress likewise has authorized national banks to act "as trustee, executor, administrator, [or] registrar of stocks and bonds," so long as such authorization is "not in contravention of State or local law." 12 U.S.C. § 92a; *see also, e.g.*, 12 U.S.C. § 24 (Eighth) (permitting charitable contributions by national banks unless state law prohibits such contributions by state banking institutions); 12 U.S.C. § 90 (permitting national banks to give security for deposits by states or political subdivisions to the extent authorized by state law).

In short, where Congress intends to permit state law to circumscribe federally created banking powers, Congress does so expressly and should not lightly be presumed to do so by implication. *See Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 & n.7 (1954). In *Franklin*, this Court held that New York could not prohibit a national bank from using the term "savings" in its name because national banks had the right to receive deposits and pay interest on customers' savings. Although the state law presented no direct conflict (because the National Bank Act does not expressly empower national banks to use "savings" in their names), the Court found no congressional intent to subject a "phase of national banking to local restrictions" by implication where Congress had done so "by express limitation in several other instances." *Id.* at 378; *see also Ramapo Bank v. Camp*, 425 F.2d 333, 344 (3d Cir.) (because National Bank Act provision on bank relocations contains no express grant of power to states, contrary state law preempted), *cert. denied*, 400 U.S. 828 (1970). Except as Congress has otherwise provided, "the State cannot lay hold of its general control of administration to deprive national

banks of their power to compete that Congress is authorized to sustain." *Missouri ex rel. Burnes Nat'l Bank v. Duncan*, 265 U.S. 17, 24 (1924) (Holmes, J.).

Congress did not subject the "phase of national banking" at issue here—insurance agency activity—to "local restrictions." Section 92 accords the states *no* power over national banks. Congress explicitly acknowledged in Section 92 that the states regulate insurance companies doing business within their borders, but designated the Comptroller to regulate the activities of national banks acting as agents for state-licensed insurance companies.³ Congress kept in the hands of the Comptroller, and out of the hands of the states, authority over the insurance-related activities of the national banks themselves.

In granting national banks the power to act as insurance agents, Congress could have permitted banks to exercise that power only where in accord with state law. Congress also could have provided that national banks may act as insurance agents subject to "such rules and regulations as the State insurance authorities may prescribe." Or Congress might have provided that national banks may act as general insurance agents to the "same extent as state-chartered banks" or only if such activity were "not in contravention of State law."

Congress did not select any of these options. Section 92 does not contemplate *any* state role in determining whether national banks may sell insurance. Congress chose to retain federal supremacy over the power of

³ "[A national banking] association located and doing business in any place the population of which does not exceed five thousand . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State." 12 U.S.C. § 92.

national banks to act as insurance agents and reposed in the Comptroller authority to prescribe any necessary rules.

The Florida antiaffiliation law provides that “[n]o insurance agent . . . who is associated with . . . a financial institution shall engage in insurance agency activities.” Fla. Stat. Ann. § 626.988(2) (quoted in full at page 5 of Petition). The Florida law by its terms imposes this restriction upon national banks as well as state chartered institutions. *Id.* § 626.988(1)(a) (see Pet. at 4-5). Florida singles out banks, including national banks and affiliated persons, banning them from the insurance marketplace despite the express language of Section 92.⁴ Florida’s law thus seeks to do precisely what Justice Holmes described as forbidden—“to deprive national banks of their power to compete.” See *Missouri ex rel. Burnes Nat’l Bank*, 265 U.S. at 24.

C. The General Language Of The McCarran-Ferguson Act Is Not Directed At National Bank Powers, Including The Specific Power To Sell Insurance Granted By Section 92.

McCarran-Ferguson was not intended to restrict national bank insurance activities authorized by federal law. Neither its text nor its legislative history contains any reference to banking.

Until 1944 many believed that the issuance of insurance contracts was not a transaction in “commerce.” In that year this Court held that Congress has power under

⁴ That the Florida statute is riddled with exceptions—i.e., it exempts from the restriction banks that are not subsidiaries or affiliates of a bank holding company and are located in a city having less than 5000 residents, as well as “grandfathered” banks engaged in insurance sales prior to enactment, Fla. Stat. Ann. § 626.988(1)—demonstrates that the law’s true purpose is to protect the income of independent insurance agents. See generally Brief of American Bankers Association et al. as Amici Curiae, Point II; Brief of Florida Bankers Association as Amicus Curiae, *passim*.

the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, to regulate insurance activity and had exercised that power permissibly in enacting the Sherman Act. *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944).

In the eyes of Congress, *South-Eastern Underwriters* threatened long-standing state regulation and taxation of the business of insurance in two ways. First, federal laws enacted under Commerce Clause authority could, by implication, be applied to supersede state regulation of insurance. Second, even in the absence of legislation under the Commerce Clause, the “dormant” commerce power might be construed to restrict state regulation of insurance activity. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946).⁵

McCarran-Ferguson states that it was enacted so that “silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation” of the insurance business by the state. 15 U.S.C. § 1011 (emphasis added). In the words of Senator O’Mahoney, which were confirmed by Senator Ferguson, what Congress sought to assure was that “no existing law and no future law should, by mere implication, be applied to the business of insurance” simply because the law might relate to commerce. 91 Cong. Rec. 1487 (1945) (emphasis added). To this end, Section 2(b) of McCarran-Ferguson provides that a federal law may only preempt state insurance laws if the federal enactment “specifically relates to the business of insurance.” 15 U.S.C. § 1012(b).

⁵ Before *South-Eastern Underwriters*, “negative implication from the commerce clause was held not to place any limitation” on state insurance regulation, *Benjamin*, 328 U.S. at 414, and the Supreme Court routinely had upheld state regulation of the insurance activities of out-of-state companies, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).

Accepted principles of statutory construction, as applied by this Court to the federal banking laws, confirm this conclusion:

[A] statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."

Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)) (footnote omitted); see also *Cook County Nat'l Bank*, 107 U.S. at 448, 451 (describing National Bank Act as "a complete system for the establishment and government of national banks" and stating that as a specific, comprehensive statute on a particular subject, the National Bank Act prevails over a general—though in that instance an earlier-enacted—statute).

In *Radzanower* an action was brought against a national bank for alleged violations of the Securities Exchange Act of 1934. The bank was headquartered in Boston but the action was brought in the Southern District of New York. The district court dismissed the action because the special venue provision of the National Bank Act then in force, 12 U.S.C. § 94 (1970), required that a lawsuit against a national bank be brought in the district where the home office of the bank was located. The court of appeals affirmed. In this Court the plaintiff-petitioner claimed that the applicable venue provision was not that of the National Bank Act but that of the Securities Exchange Act of 1934. The latter provision permitted a securities fraud action to be brought in any district where the violation occurred or where the defendant might be found.

Writing for the Court, Justice Stewart first noted that 12 U.S.C. § 94 evidenced a specific intent by Congress to

limit the courts in which a national bank could be sued. *Radzanower*, 426 U.S. at 152. Invoking the rule of statutory construction that the specific overrules the general, even where the general law is the later-enacted of the two, *id.* at 153, as well as the "cardinal principle . . . that repeals by implication are not favored," *id.* at 154 (quoting *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976) (footnote omitted)), the Court held that the national bank venue provision prevailed. The Court also noted that "[t]he legislative history of the Securities Acts does not indicate that Congress considered banks as likely defendants in actions brought under those acts." *Id.* at 155 n.11.

Radzanower is analogous to this case. The Court there noted that "[w]hen Congress enacted the narrow venue provisions of the National Bank Act, it was focusing on the particularized problems of national banks." *Id.* at 153. Seventy years later in the Securities Exchange Act, Congress "enacted a general venue provision applicable to the broad universe of potential defendants." *Id.* at 153-54. So too here: When Congress enacted Section 92 in 1916, it focused on the particularized issue of national bank sales of insurance and the public policies favoring such activity. Decades later Congress included in McCarran-Ferguson a general provision directed to state regulation of the business of insurance, saying nothing in the statute or legislative history about national banks.

Radzanower found no "clear intention" on the part of Congress in enacting the general securities fraud venue provision to effect a "*pro tanto* repeal" of the specific banking venue provision. *Id.* at 154 (noting that repeals by implication are not favored). The Court's observation that the Securities Act "was enacted primarily to halt securities fraud, not to regulate banks," *id.* at 157, applies with equal vigor here: McCarran-Ferguson was intended to preserve existing state regulation of the business of

insurance as against *implied* congressional intrusion, not to regulate banks or, for that matter, even to override *express* federal statutes relating to the business of insurance. See *First Nat'l Bank of Eastern Ark. v. Taylor*, 907 F.2d 775 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990) (holding that McCarran-Ferguson was "not directed at the activities of national banks"); see also *United Serv. Automobile Ass'n v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986) (state antiaffiliation law not within scope of McCarran-Ferguson because, *inter alia*, "banks are not entities within the insurance industry"), *cert. denied*, 479 U.S. 1031 (1987). As with the securities acts, the text and legislative history of McCarran-Ferguson contain no reference to banks. See *Radzanower*, 426 U.S. at 155 n.11.

Section 92 expressly authorizes the Comptroller to oversee sales of insurance by national banks and to prescribe "rules and regulations" to govern national banks acting as insurance agents.⁶ Unlike the McFadden Act and the other provisions noted above, Section 92 does not contemplate any state-law limitations on such activities.

Florida's law directly conflicts with the statutory power specifically bestowed by Section 92: Florida has attempted absolutely to prohibit Petitioner, which is a national bank, from exercising its Section 92 right to sell insurance. Under traditional preemption analysis, Florida's law would fall because it interferes with the congressional scheme. *E.g.*, *Franklin Nat'l Bank*, 347 U.S. at 378-79 (power implicit under the federal banking laws for banks to use word "savings" in advertising preempts New York law prohibiting use of that term); *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982) (Cali-

⁶ The enactment of Section 92 in 1916 marked one of the first congressional grants of rulemaking authority to the Comptroller. More than sixty years would pass before Congress explicitly granted the Comptroller broad rulemaking powers. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 708, 94 Stat. 132, 188 (codified as amended at 12 U.S.C. § 93a).

fornia law prohibiting due-on-sale clause in loan instruments preempted by federal law permitting same); see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (state law preempted where federal law "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"). Nothing in the text, legislative history, or purpose of McCarran-Ferguson alters this conclusion.⁷

II. EVEN IF McCARRAN-FERGUSON APPLIES TO NATIONAL BANKS, SECTION 92 "SPECIFICALLY RELATES" TO THE BUSINESS OF INSURANCE WITHIN THE MEANING OF SECTION 2(b) OF McCARRAN-FERGUSON AND ACCORDINGLY IS PRESERVED BY McCARRAN-FERGUSON.

Even if McCarran-Ferguson applies to national banks, Section 2(b) does not save the Florida statute from preemption by Section 92. Section 2(b) provides:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insur-

⁷ Because the Florida law flatly prohibits bank participation in insurance sales, this case presents only the issue whether a state may *deny* a national bank or its employees a license to engage in insurance activities. The Court need not address the extent, if any, to which states may require national banks to conform to insurance regulations that otherwise apply to licensed insurance agents. Should such issues arise, the Comptroller has the express authority under Section 92 to deal with them. Indeed, the Comptroller long has encouraged national banks to comply with state insurance licensing laws that neither discriminate against nor stand as an obstacle to national banks. He has issued opinion letters asserting that national banking laws preempt state licensing requirements in only those narrow circumstances. See OCC Letter No. 475 (March 22, 1989), *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,012; OCC Letter No. 623 (May 10, 1993), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,505.

ance . . . unless such Act *specifically relates to the business of insurance*.

15 U.S.C. § 1012(b) (emphasis added). The language, history, and purpose of Section 2(b) compel the conclusion that Section 92 “specifically relates” to the business of insurance.⁸

When read in conjunction with Section 2(b), Section 92 is seen to preempt the conflicting Florida law because Section 92 explicitly authorizes insurance sales by national banks and therefore “specifically relates to the business of insurance.” In ordinary parlance, “specifically relates” means no more than that the law refers in some explicit sense to or has a connection with that subject. “The ordinary meaning of [‘relating to’] is a broad one—‘to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with.’” *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) (quoting Black’s Law Dictionary); *see also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995) (“in the normal sense of the phrase,” the term “relates to” means “has a connection with or reference to”) (quoting *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97 (1983) (internal quotation marks omitted)). Thus the plain meaning of Section 2(b) is that federal law preempts state insurance regula-

⁸ Because Section 92 specifically relates to the business of insurance and therefore preempts the Florida antiaffiliation statute, this Court need not determine whether the Florida statute was “enacted for the purpose of regulating the business of insurance” under the first prong of Section 2(b). Should the Court reach that issue, however, the first prong does not shield the Florida statute from preemption. The Florida statute was enacted to regulate the conduct of banks, not to regulate the business of insurance. *See United Service Automobile Ass’n v. Muir*, 792 F.2d at 364 (holding that “affiliation between insurers and banks has no integral connection to the relationship between insured and the insurer”); *see also* Brief of American Bankers Association et al. as Amici Curiae, Point II; Brief of Florida Bankers Association as Amicus Curiae, *passim*.

tion if the federal provision bears an express relation to the business of insurance.

Senator Ferguson, the Senate sponsor of McCarran-Ferguson, confirmed this conclusion during floor debate on the legislation. The purpose of the “specifically relates to” provision, he explained, was to assure that federal legislation be accorded preemptive force only if it does more than relate generally to interstate commerce:

What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance. We wanted to be sure that the Congress, in its wisdom, would act specifically *with reference to insurance* in enacting the law.

91 Cong. Rec. 1487 (1945) (emphasis added).

Section 92 speaks directly and unambiguously to the business of insurance, and its relation to that business is not “by mere implication.” *Id.* (colloquy between Sens. O’Mahoney and Ferguson). Among other things, it states that certain national banks may “act as the agent for any fire, life or other *insurance* company . . . by soliciting and selling *insurance*” and precludes national banks from guaranteeing the “payment of any premium on *insurance* policies.” 12 U.S.C. § 92 (emphasis added). Indeed, the stated purpose of Section 92 is to permit national banks to engage in the sale of insurance. The congressional concern underlying McCarran-Ferguson—that federal law not be construed by mere implication to override state insurance law—has no application to this case.

Further demonstrating that “specifically relates to” carries no more than its obvious meaning (i.e., refers to in a specific manner), Congress provided elsewhere in Section 2(b) that *state* laws are shielded from preemption only where such laws have the purpose to “*regulat[e]*”—and *not simply relate to*—the business of insurance. 15 U.S.C. § 1012(b) (emphasis added); *see Morales*, 504

U.S. at 383-84 (distinguishing between "relating to" and "regulate"). "Regulate" means "[t]o fix, establish, or control; . . . to direct by rule or restriction; to subject to governing principles or laws." Black's Law Dictionary 1286 (6th ed. 1990). Congress did not limit the category of preemptive *federal* statutes to those that *regulate* the business of insurance, however. The contrasting terminology used deliberately by Congress to distinguish between the two prongs of Section 2(b), cannot be dismissed as easily as the Respondents suggest.

The court of appeals contended that Section 92 does not specifically relate to the business of insurance because Congress enacted the provision before this Court's decision in *South-Eastern Underwriters*, at a time when Congress did not believe that it had power to "regulate" the business of insurance. Pet. App. 15a. Given Congress' choice not to use the term "regulate" to describe the federal laws that preempt state insurance regulation, however, this conclusion is erroneous. See *Morales*, 504 U.S. at 385-86 (holding that when Congress uses the word "relate" it conveys a different—and far broader—meaning than "regulate").

Moreover, given that when McCarran-Ferguson was enacted there were no existing federal laws that evidenced an intent to "regulate" the business of insurance, the court of appeals' novel interpretation of the phrase "relates to" as meaning "regulates" makes no sense. E.g., *South-Eastern Underwriters*, 322 U.S. at 544 (noting that before 1944 "Congress had at no time attempted to control the insurance business"). Although Congress had not "regulated" insurance prior to 1945, McCarran-Ferguson was intended to retain the preemptive effect not only of future acts of Congress but of federal statutes *then in force*. 91 Cong. Rec. 479 (1945) (colloquy between Sens. Murdock and Ferguson). "Specifically relates" thus means nothing more than that a law expressly relates to insurance. Section 92 passes this test.

Finally, the court of appeals failed to consider that Congress rejected language for McCarran-Ferguson under which federal statutes would have preempted state insurance regulation in a far narrower class of cases than that covered by the enacted version of the legislation. The House and Senate-passed versions provided that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act *specifically so provides*." 91 Cong. Rec. 488 (1945) (Senate) (emphasis added); *id.* 1085-94 (House). Had Congress enacted that language, a federal act would have to provide expressly that it invalidates, impairs, or supersedes state law in order to have preemptive effect upon a state insurance regulation. The conference version of the legislation, however, provided that a federal law need only "*specifically relate to the business of insurance*" in order to "invalidate, impair or supersede" state law. H.R. Rep. No. 213, 79th Cong., 1st Sess. 1 (1945) (conference report) (emphasis added). Congress agreed to, and President Roosevelt approved, the conference version. Act of March 9, 1945, ch. 20, 59 Stat. 34. Thus Congress expressly considered and rejected the very formulation that the court of appeals has imposed in the decision under review.

So long as a federal statute has an express connection to insurance activities, then, see *Morales*, 504 U.S. at 383-84, it will preempt conflicting state laws that regulate insurance. Section 92 fits comfortably within the type of federal law that specifically relates to the business of insurance and accordingly is preserved by the second prong of McCarran-Ferguson's Section 2(b).

CONCLUSION

For the reasons set out above and in the other briefs filed in support of the Petitioner, the judgment of the court of appeals should be reversed and remanded with instructions to enter a judgment declaring that Section 92 pre-empts Fla. Stat. Ann. § 626.988(2) and permanently enjoining the Florida authorities from interfering with the Petitioner's exercise of its national bank rights under Section 92.

Respectfully submitted,

DAVID W. RODERER *
ERIC L. HIRSCHHORN
DONN C. MEINDERTSMA
WILLIAM B.F. STEINMAN
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005-3502
(202) 371-5700

Counsel for Amici Curiae

* Counsel of Record

November 1995

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Supreme U.S.

FILED

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No. 94-1837

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

vs.

TOM GALLAGHER, INSURANCE COMMISSIONER OF
THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF
INSURANCE, FLORIDA ASSOCIATION OF LIFE
UNDERWRITERS, PROFESSIONAL INSURANCE
AGENTS OF FLORIDA, INC., AND FLORIDA
ASSOCIATION OF INSURANCE AGENTS,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**BRIEF OF THE NEW YORK CLEARING
HOUSE ASSOCIATION AS *AMICUS CURIAE* IN
SUPPORT OF THE PETITIONER**

H. RODGIN COHEN
MICHAEL M. WISEMAN
MICHAEL E. JOHNSON
SULLIVAN & CROMWELL
Of Counsel

NORMAN R. NELSON
General Counsel
The New York Clearing
House Association
Of Counsel

November 8, 1995

BRUCE E. CLARK
125 Broad Street
New York, New York 10004
(212) 558-4000

*Counsel of Record for The
New York Clearing House
Association, Amicus
Curiae*

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Respondents.

ON WRIT OF CERTIORARI
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 FOR THE ELEVENTH CIRCUIT

**BRIEF OF THE NEW YORK CLEARING
 HOUSE ASSOCIATION AS *AMICUS CURIAE* IN
 SUPPORT OF THE PETITIONER**

Pursuant to Rule 37.3 of this Court, this brief is respectfully submitted by The New York Clearing House Association (the "Clearing House") with the consent of all parties.

Interest Of *Amicus Curiae*

The Clearing House is an unincorporated association of eleven commercial banks in New York City.¹ The Clearing

¹ The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan
 (continued...)

House frequently appears as *amicus curiae* in cases, such as this one, that raise important questions concerning the ability of its member banks to provide products and services to the public.

The Clearing House has a significant interest in the questions presented here because of its member banks' present and potential involvement in the sale of insurance products as agents pursuant to 12 U.S.C. § 92 ("Section 92"). In an era of rapid consolidation of the financial services industry and increasing lack of differentiation among financial products, it is essential that commercial banks be permitted to offer, and consumers be able to obtain, insurance products to the extent authorized by Congress. State statutes and judicial interpretations that would limit that federal authority damage the Clearing House member banks and other members of the banking industry, harm consumers of financial services and are antithetical to our political and commercial system.

The Eleventh Circuit's decision below, *Barnett Bank, N.A. v. Gallagher*, 43 F.3d 631 (11th Cir. 1995) ("*Barnett Bank*"), upheld a Florida statute forbidding certain national banks to sell insurance, a result that is inconsistent with the plain meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), and with Section 92, the federal statute that "[a]lmost 80 years ago . . . authorized any national bank" to sell insurance, *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, ___ U.S. ___, ___, 113 S. Ct. 2173, 2176 (1993) ("*United States Nat'l Bank*"). Members of the

¹(...continued)

Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, NatWest Bank N.A., European American Bank, and Republic National Bank of New York.

Clearing House therefore are directly affected by the decision below because of the unwarranted preclusion that it creates.²

Statutes Involved

This case involves the interpretation of two federal statutes and one state statute, which read in relevant part as follows:

15 U.S.C. § 1012(b) (the McCarran-Ferguson Act)

"[N]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance"

12 U.S.C. § 92

"In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by

² Four members of the Clearing House, The Chase Manhattan Bank, N.A., Citibank, N.A., NatWest Bank N.A., and Republic National Bank of New York, are national banks subject to the National Bank Act, ch. 106, 13 Stat. 99 (1864) (codified, as amended, in sections of Title 12 of the United States Code, which includes 12 U.S.C. § 92, discussed herein). In addition, at least three other members have affiliates which are national banks.

such company . . . *Provided, however,* That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance."

Fla. Stat. ch. 626.988(2)

"No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency."³

The Eleventh Circuit held that the Florida statute regulated the business of insurance, but that Section 92 did not specifically relate to the business of insurance.

³ "Specifically excluded from this definition ['Financial institution'] is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census." Fla. Stat. ch. 626.988(1)(a). Petitioner is a national bank subsidiary of a bank holding company, and as such does not benefit from this exclusion.

Summary Of Argument

As this Court has recognized,⁴ in enacting Section 92 Congress specifically authorized national banks located and doing business in any place whose population does not exceed five thousand inhabitants to sell insurance as agents, subject to rules and regulations prescribed by the Comptroller of the Currency. The Congress therefore has determined that national banks have this authority.

The McCarran-Ferguson Act creates a limited exception to the basic Constitutional policy of economic federalism by establishing a two-part test for a state statute to be immune from federal preemption. First, the state statute must "regulat[e] the business of insurance." Second, even if the state statute satisfies this first requirement, the federal statute will still preempt the state statute if the federal statute "specifically relates to the business of insurance." The state and federal statutes in question here cannot, under any logical reading, satisfy both prongs of this test. If the Florida statute's affiliation prohibition constitutes regulation of the business of insurance, then the federal statute's authorization at least relates to the business of insurance.

The Framers of the Constitution adopted a basic policy for this nation, designed to ensure against a balkanized and ultimately weakened economy, that matters of commerce should be the province of the Congress and not the individual states. U.S. Const. art. I, § 8; see *Gibbons v. Ogden*, 22

⁴ *Nationsbank of North Carolina v. Variable Annuity Life Ins. Co.*, __ U.S. __, 115 S. Ct. 810, 812 (1995) ("*Nationsbank*") ("Section 92 . . . expressly authoriz[es] banks in towns of no more than 5,000 people to sell insurance"); *United States Nat'l Bank*, __ U.S. at __, 113 S. Ct. at 2176 ("Almost 80 years ago, Congress authorized any national bank 'doing business in any place the population of which does not exceed five thousand inhabitants . . . [to] act as the agent for any fire, life, or other insurance company.'") (quoting Section 92) (alteration in original).

U.S. (9 Wheat.) 1, 195 (1824). Although Congress may cede its powers in specific instances to the states, the basic Constitutional policy should not be thwarted by a distorted reading of the relevant statutes, as respondents have sought in this case.

The court below adopted the self-contradictory proposition that a state statute that *bars* banks and their affiliates from selling insurance is "regulat[ion]" of the business of insurance, but that a federal statute that *authorizes* national banks to sell insurance does not even "relat[e]" to the business of insurance. The Clearing House believes that the court below was in error on both prongs of the McCarran-Ferguson test. In any event, it should be beyond doubt that the court below cannot be correct on both prongs. If a statute barring insurance sales "regulat[es]" the business of insurance, then a statute specifically authorizing insurance sales must "relat[e]" to that business.

ARGUMENT

I.

The Eleventh Circuit Misapplied Both Parts of the McCarran-Ferguson Act

A. The Eleventh Circuit Erred in Holding That the Florida Statute Was Enacted for the Purpose of Regulating the Business of Insurance.

A state statute satisfies the first part of the McCarran-Ferguson Act test only if the state law was "enacted for the purpose of regulating the business of insurance." The Eleventh Circuit, purporting to rely on this Court's decisions in *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969) ("*National Securities*"), and *United States Department of*

Treasury v. Fabe, ___ U.S. ___, 113 S. Ct. 2202 (1993) ("*Fabe*"), concluded that Fla. Stat. ch. 626.988(2) satisfied this requirement because the law was designed to "protect policyholders." *Barnett Bank*, 43 F.3d at 635. Neither decision supports the Eleventh Circuit's conclusion that a statute excluding national banks from selling insurance products as agents is a statute "enacted for the purpose of regulating the business of insurance."

This Court in *National Securities* held that a state statute requiring that all insurance company mergers be approved by the state insurance director was not "enacted for the purpose of regulating the business of insurance." The Court's holding turned on its conclusion that the "relationship between the insurance company and the policyholder" constitutes the "core of the 'business of insurance.'" *National Securities*, 393 U.S. at 460. Because the state statute instead primarily protected the relationship between the insurer and its shareholders, the statute was not one "enacted for the purpose of regulating the business of insurance." *Id.*

In *Fabe*, the Court held that a state statute giving priority to the claims of policyholders against an insolvent insurance company over the claims of other creditors was a statute enacted for the purpose of regulating the business of insurance. Once again, this Court focused on the relationship between the policyholder and the insurance company. The Court reviewed the three criteria used to identify the "business of insurance" in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982) ("*Pireno*").⁵ The Court held

⁵ The Court in *Pireno*, construing McCarran-Ferguson's antitrust exemption, 15 U.S.C. § 1013(b), applied the following three-part test for identifying a practice as the "business of insurance": "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is (continued...)"

that under *Pireno* an insurer's performance of its obligations pursuant to an insurance contract constitutes the "business of insurance." *Fabe*, __ U.S. at __, 113 S. Ct. at 2209. The Court proceeded to characterize the state's priority statute as one "enacted for the purpose of regulating" insurance because the state statute "was designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy." *Id.*

These opinions determine that a state statute may be held to have been enacted for the purpose of regulating the business of insurance when the practices affected deal with the policy relationship between an insurer and an insured, including spreading the policyholder's risk, or with the performance of an insurer's obligations to the insured, but not when the state statute deals with the relationship between an insurance company and those other than policyholders, for example, shareholders of the company or competitors.

A state statute that bars national banks from acting as insurance agents in no way "regulates the business of insurance" because it has nothing to do with spreading risk or with the contract between insurer and insured, *see Pireno*, 458 U.S. at 127-29, or with the performance of a contract of insurance, *see Fabe*, __ U.S. at __, 113 S. Ct. at 2209. Instead, the Florida statute merely restricts competition by prohibiting national bank subsidiaries of bank holding companies from engaging in selling insurance as agents at all.⁶

⁵(...continued)

limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129. The Florida statute in question here satisfies none of these tests.

⁶ In focusing on whether the purpose of the statute under scrutiny in *Fabe* was to regulate the business of insurance, the Court relied in part (continued...)

Indeed, if Fla. Stat. ch. 626.988(2) "regulat[es]" anything, it, like Section 92, regulates the business of banking. *See National Securities*, 393 U.S. at 460. Banks are in the business of offering financial services to their clients. *See Nationsbank*, __ U.S. at __, 115 S. Ct. at 814 (recognizing that "[n]ational banks . . . serve as agents for their customers in the purchase and sale of various financial instruments"). The Florida statute attempts to adjust, manage and control the business of banking by limiting the authority of national banks to offer services to their customers, even though that authority is expressly granted by federal law. It directly affects the relationship between banks and their customers, limiting the availability of services that would otherwise be available to banking consumers, and leaves the relationship between insurer and insured undisturbed.

B. The Eleventh Circuit Erred in Holding That Section 92 Does Not Specifically Relate to the Business of Insurance.

Under the second prong of the McCarran-Ferguson Act test, a federal statute preempts a state statute "enacted for the purpose of regulating the business of insurance" if the federal statute "specifically relates to the business of insurance." The Eleventh Circuit erroneously concluded that Section 92 does not satisfy this requirement.

The "starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any

⁶(...continued)

on the definition of "purpose" in Black's Law Dictionary 1236 (6th ed. 1990). *Fabe*, __ U.S. at __, 113 S. Ct. at 2210. That same reference draws an explicit distinction between regulation and prohibition, defining the word "prohibit" as "[t]o forbid by law; to prevent; — *not synonymous with 'regulate.'*" Black's Law Dictionary 1212 (6th ed. 1990) (emphasis added).

case involving the meaning of a statute, is the language of the statute itself.” *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2207-08 (quoting *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979)). Ignoring this fundamental tenet of statutory construction, the Eleventh Circuit instead arrived at its narrow construction of the second part of McCarran-Ferguson by deviating substantially from the actual language of the statute.

Purporting to rely on *Fabe*, the court first held that a federal statute could preempt a state statute satisfying the first part of McCarran-Ferguson only if the federal statute “specifically requires” that it take precedence over the state law. *Barnett Bank*, 43 F.3d at 636. After rewording Congress’ language in the second part of McCarran-Ferguson to include this specific preemption requirement, the court’s application of its new test then inexplicably substituted the “regulating” language of the *first* part of McCarran-Ferguson for the broader term, “relates to,” used by Congress. The Eleventh Circuit reviewed the history of Section 92 and concluded that the statute could not be construed to relate to insurance or specifically to require preemption because “Congress could not have been attempting to *regulate*” insurance since it believed it had no power to do so. *Id.* at 637 (emphasis added).⁷

In attempting to amend the actual language of McCarran-Ferguson, the Eleventh Circuit relied on a passing reference elsewhere in *Fabe* to the second part of McCarran-Ferguson, in which the Court noted that a federal statute still preempts a state statute if the federal law so “requires.” See *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2211. But *Fabe* never applied any such specific preemption requirement because, as

⁷ In fact, Section 92’s authorization of national banks to sell insurance as agents would be a regulation of insurance, at least on the Eleventh Circuit’s own analysis that the Florida statute prohibiting such sales is a regulation of insurance.

the Court itself expressly noted, the parties agreed that the federal statute at issue did not “relat[e]” to insurance. *Id.* at ___, 113 S. Ct. at 2208. The *Fabe* holding turned solely on the only contested issue, *i.e.*, the construction of the first part of McCarran-Ferguson, and it cannot fairly be interpreted as holding that the language of the second part of McCarran-Ferguson is anything other than that which Congress drafted. Thus, the Eleventh Circuit erroneously relied exclusively on what is at most *dictum* from the *Fabe* opinion for its new test. See *United States Nat’l Bank*, ___ U.S. at ___ n.11, 113 S. Ct. at 2187 n.11 (stressing the “need to distinguish an opinion’s holding from its *dicta*”).

The Eleventh Circuit’s substitution of other words for the operative verb “relates” represents an impermissible melding of the two parts of McCarran-Ferguson. In its critical discussion of the history of Section 92, the court eventually resorted to the operative verb from the first part of McCarran-Ferguson, “regulat[e]” in an attempt to explain the second clause. *Barnett Bank*, 43 F.3d at 637. Similarly, the court’s discussion of what Congress was “attempting to regulate” with Section 92, *id.*, suggests that the court was erroneously applying the “for the purpose of regulating” requirement of the first part of McCarran-Ferguson. The second part of McCarran-Ferguson requires only that a statute “specifically relat[e] to” insurance, not that the statute be enacted “for the purpose of regulating” insurance.

Had the Eleventh Circuit adhered to the actual language of the second part of McCarran-Ferguson, it would have correctly concluded that Section 92 preempts the Florida statute. The plain meaning of “relates” requires that the second part of McCarran-Ferguson be read to reach a statute that bears on the business of insurance whether or not there is actual regulation. See Black’s Law Dictionary 1288 (6th ed. 1990) (defining “relate” as “[t]o stand in some relation; to have bearing or concern; to pertain”). Although the Court has not yet had the occasion to elaborate on the scope of the

second part of McCarran-Ferguson, it has recognized the conceptual breadth implicit in Congress' decision to use the word "relat[e]." See *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, ___ U.S. ___, ___, 114 S. Ct. 517, 525 (1993) ("*John Hancock*") (noting that ERISA "'obviously and specifically relates to the business of insurance'" (quoting with approval brief of United States as *amicus curiae*); *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) ("*Morales*") (holding that the "ordinary meaning" of "relating to" is a "broad one" and citing Black's Law Dictionary definition of "relate").

The Eleventh Circuit's insupportably narrow interpretation of the second part of McCarran-Ferguson cannot coexist with its broad interpretation of the first part. "Relates," the word Congress chose to use in the second part of McCarran-Ferguson, plainly encompasses a larger set of relationships than does "regulating," the word Congress chose for the first part. Compare *Morales*, 504 U.S. at 383, with *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2210. A statute that "regulat[es]" insurance also "relates" to insurance, but a statute that "relates" to insurance does not necessarily "regulat[e]" it. Thus, if a state statute *barring* national banks from acting as insurance agents is a statute "enacted for the purpose of regulating" insurance, a federal statute that *allows* banks to act as insurance agents must, at a minimum, "specifically relat[e] to" insurance. Once the Eleventh Circuit concluded that certain national bank activities constitute the "business of insurance" and that a statute prohibiting banks from engaging in those activities "regulat[es] the business of insurance," it was bound to conclude that a federal statute permitting banks to participate in those activities at least "relates to the business of insurance."

The Eleventh Circuit attempts to overcome the flaws in its analysis of the statutory language by insisting that, with Section 92, "Congress was concerned with banking, not insurance." *Barnett Bank*, 43 F.3d at 637.

This argument, however, sets up a false dichotomy that fails to address the "specifically relates to" test of McCarran-Ferguson. Even if a statute can only "regulat[e]" one industry or one business (which is questionable), that statute can still "relat[e]" to other industries or businesses. See *John Hancock*, ___ U.S. at ___, 114 S. Ct. at 525. Obviously, Congress was regulating banking in the National Bank Act, but just as obviously when it enacted Section 92 it regulated banking in a manner that plainly "relates" to insurance.

At the same time, the Eleventh Circuit's false dichotomy proves too much, undermining its own analysis of the first part of McCarran-Ferguson. If a statute permitting banks to sell insurance products (*i.e.*, Section 92) is a banking statute, and not an insurance statute, so too must a statute prohibiting banks from offering such services (*i.e.*, the Florida statute) be a banking statute and not an insurance statute. Applying this logic to the first part of McCarran-Ferguson, Fla. Stat. ch. 626.988(2) must be deemed a banking rather than an insurance statute because it targets the relationship between banks and their customers.

The Eleventh Circuit opinion is thus invalidated by its irreconcilable internal inconsistency. A principled and consistent application of McCarran-Ferguson to Fla. Stat. ch. 626.988(2) and Section 92 requires that the Court conclude that the latter preempts the former. Either Section 92 preempts under traditional preemption analysis because Fla. Stat. ch. 626.988(2) was not "enacted for the purpose of regulating insurance," or Section 92 preempts under McCarran-Ferguson because Fla. Stat. ch. 626.988(2) was "enacted for the purpose of regulating insurance" and Section 92 "relates to the business of insurance." The similarity of the two statutes and the structure of McCarran-Ferguson allow no other conclusion.

II.

The Eleventh Circuit's Erroneous Application of the McCarran-Ferguson Act Is Inconsistent With the Established Rule That State Laws Yield to Federal Regulation of National Banks

Congress has the primary authority to define the scope and nature of activities in which national banks may engage. See *Nationsbank*, ___ U.S. at ___, 115 S. Ct. at 813. Where Congress has affirmatively granted powers to national banks, "any attempt by a state to define their duties or control the conduct of their affairs is void." *First Nat'l Bank v. California*, 262 U.S. 366, 369 (1923); see also *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819). States may not vary or limit those powers unless the federal statute expressly invites states to do so. See *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954) ("*Franklin Nat'l Bank*"). The presumptive invalidity of state legislation that seeks to limit powers extended to national banks by Congress ensures the uniformity of national banking throughout the United States. See *Easton v. Iowa*, 188 U.S. 220, 229 (1903) ("*Easton*").

The Eleventh Circuit's decision abrogates these established principles, but the plain meaning of Section 92 is clear: national banks have the authority to offer insurance products to their customers, subject to only two express restrictions. First, Section 92 prohibits a bank from paying or guaranteeing premiums paid to the insurer. Second, Section 92 prohibits banks from guaranteeing the truth of statements contained in an insured's application for insurance. While states may regulate aspects of the relationship between an insurance company and a policyholder, a prohibition against selling insurance products when such sales are not permitted by state law is conspicuously absent in an otherwise

detailed and explicit federal statute that permits such sales. The strong presumption that Congress does not pass National Bank Act legislation subject to the approval of state legislators counsels against the interpretation of McCarran-Ferguson adopted by the Eleventh Circuit. See *Franklin Nat'l Bank*, 347 U.S. at 378.

The result reached by the Eleventh Circuit frustrates the important National Bank Act policies of achieving uniformity in national bank activities and enabling Congress to decide what national bank powers and restrictions are in the best interests of the banks themselves, bank customers and the American economy. The Court has recognized that the National Bank Act

"has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states."

Easton, 188 U.S. at 229. The Eleventh Circuit decision would vitiate this policy by effectively authorizing states to choose whether or not they will recognize Section 92. Petitioner has identified fifteen states that already have attempted to prohibit national banks located in their states from exercising the powers granted by this section of the National Bank Act (Petition at 6 & n.1), and more states may follow suit if the Eleventh Circuit decision is allowed to stand. The Eleventh Circuit decision abrogates the goal of uniformity and Congressional supremacy in national banking powers by sanctioning a patchwork regime, under which the scope of national banks' insurance powers varies from state to state.

The Eleventh Circuit's misconstruction of McCarran-Ferguson runs afoul of well-established principles concerning the interpretation of national bank statutes. By contrast,

adhering to the actual language of McCarran-Ferguson and the Court's precedents, as urged in Section I, *supra*, results in an application of Section 92 that furthers federal interests in the supremacy of national bank legislation. A statutory interpretation that reconciles federal statutes is certainly preferable to an interpretation that creates unnecessary conflict. The Eleventh Circuit construction of McCarran-Ferguson should be rejected in favor of the interpretation that is consistent with the long-standing tradition of the supremacy of federal regulation of national banks over conflicting state statutes in the absence of a clearly expressed Congressional intent to the contrary.

Conclusion

The decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

BRUCE E. CLARK
125 Broad Street,
New York, New York 10004.
(212) 558-4000
*Counsel of Record for The New
York Clearing House Association,
Amicus Curiae*

H. Rodgin Cohen
Michael M. Wiseman
Michael E. Johnson

SULLIVAN & CROMWELL
Of Counsel

Norman R. Nelson
General Counsel
The New York Clearing
House Association
Of Counsel

November 8, 1995

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Supreme Court, U. S.
FILED
NOV 9 1995
CLERK

No. 94-1837

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

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Petitioner,

v.

TOM GALLAGHER, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, ET AL.,

Respondents

**On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**BRIEF OF THE AMICI CURIAE
AMERICAN BANKERS ASSOCIATION, ET AL.,
IN SUPPORT OF PETITIONER**

JOHN J. GILL III
Counsel of Record

MICHAEL F. CROTTY
MATHEW H. STREET

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

Attorneys for Amici Curiae

November 9, 1995

*Complete list of sponsoring organizations and counsel
appear on inside cover.

39 PR

JAMES T. MCINTYRE
THE MCNAIR LAW FIRM
1155 15th Street, N.W.
Washington, D.C. 20005
(202) 659-3900
*Attorney for Association of
Banks in Insurance*

RICHARD M. WHITING
THE BANKERS ROUNDTABLE
805 15th Street, N.W.
Washington, D.C. 20005
(202) 289-4322

LEONARD J. RUBIN
BRACEWELL & PATTERSON
2000 K Street, N.W.
Washington, D.C. 20006
(202) 828-5800
*Attorney for Independent
Bankers Association of America*

GERALD M. NOONAN
CONNECTICUT BANKERS
ASSOCIATION
450 Church Street
Hartford, CT 06103
(203) 527-5161

THOMAS H. RISTINE
ICE MILLER DONADIO & RYAN
One American Square
Indianapolis, IN 46282
(317) 236-2100
*Attorney For Indiana
Bankers Association*

M. THURMAN SENN
MORGAN & POTTINGER
601 W. Main
Louisville, KY 40202
(502) 589-2780
*Attorney for Kentucky
Bankers Association,
Owensboro National Bank,
First National Bank of
Louisia, and Citizens
National Bank of Paintsville*

MARY E. ARCENEAX
LOUISIANA BANKERS
ASSOCIATION
P.O. Box 2871
Baton Rouge, LA 70802
(504) 387-3282

MCKINLEY W. DEAVER
B. CLINT GARDNER
MISSISSIPPI BANKERS
ASSOCIATION
P.O. Box 37
Jackson, MS 39205
(601) 948-6366

DAVID L. GLASS
NEW YORK STATE BANKERS
ASSOCIATION
485 Lexington Avenue
New York NY 10017
(212) 949-1184

QUESTIONS PRESENTED

1. Whether a federal statute that gives a national bank operating in a town with a population not exceeding five thousand the right to sell insurance (12 U.S.C. § 92) preempts a state law that prohibits such a bank from selling insurance.

2. Whether a state law prohibiting banks from selling insurance is a law enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

3. Whether 12 U.S.C. Section 92 is an "Act [that] specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

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For the Eleventh Circuit

BRIEF OF THE AMICI CURIAE
AMERICAN BANKERS ASSOCIATION, ET AL.,
IN SUPPORT OF PETITIONER

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioner in accordance with the provisions of Rule 37.3 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The American Bankers Association, Association of Banks in Insurance, The Bankers Roundtable, and the Independent Bankers Association of America are national trade associations of the commercial banking industry that, collectively, represent very nearly every banking institution in the country. All of the associations frequently appear in litigation on matters of concern to their respective members. The question of the extent to which banks may participate in an entire line of business specifically made available to them by statute self-evidently fits within the interests of the associations.

The Connecticut, Indiana, Kentucky, Louisiana, Mississippi and New York State Bankers Associations are trade associations for the commercial banking industry within their respective states. Each of them has appeared as amicus curiae or as a party in litigation over the insurance or annuity sales powers of commercial banks, either in this Court or in federal or state courts in their respective jurisdictions.

The Owensboro National Bank, First National Bank of Louisa, and Citizens National Bank of Paintsville are national banks located and doing business in small towns in Kentucky. Together with the Kentucky Bankers Association, they are and have been parties to litigation against the Commissioner of the Department of Insurance of Kentucky. That litigation resulted in a decision upholding the preemptive effect of federal law over Kentucky's version of state anti-affiliation statutes. *Owensboro National Bank v.*

Stephens, 44 F.3d 388 (6th Cir. 1994). That decision, in turn, resulted in a Petition for Writ of Certiorari filed by the Commissioner, *Stephens v. Owensboro National Bank*, 64 U.S.L.W. 3069 (U.S. July 13, 1995)(No. 95-74). This Court has not acted on that Petition, making it apparent that the ultimate outcome of the Kentucky litigation will be determined in large measure by the outcome of this case.¹

In addition to the three cases before this Court, there are at least three other cases² now pending before or recently decided by courts around the country that explore the extent of the powers, if any, of state insurance commissioners to limit the exercise of lawful authority of

¹ Amicus Louisiana Bankers Association is similarly situated. The Association, along with the American Bankers Association and the Association of Banks in Insurance, was an amicus curiae in *First Advantage Insurance v. Green*, 652 So. 2d 562 (La. Ct. App. 1995), *application for writ of certiorari or review denied*, No. 95-C-0820 (La., May 5, 1995), *petition for cert. filed*, 64 U.S.L.W. 3017 (U.S. June 27, 1995) (No. 94-2130). The Court likewise seems to be holding this Petition until a decision on the merits of *Barnett*, thereby making this brief the only realistic opportunity for the Louisiana Bankers Association to state its position on the issues affecting the litigation of most immediate concern to it.

² The others include *NBD Bank, N.A. v. Bennett*, ___ F.3d ___ (No. 95-1310 (7th Cir., Oct. 4, 1995)); *Shawmut Bank Connecticut, N.A. v. Googins*, No. 3:94 CV 146 (RNC) (D. Conn.); and *Deposit Guaranty National Bank v. Dale*, No. 95 CV 640 WS (S.D. Miss.).

national banks. Amici are interested in the outcome of those cases as well, and recognize that the decision of this Court in the present case could well be dispositive of that "next generation" of cases as well.

Ostensibly relying on "states' rights" and "consumer protection" as the stated justification for their position, insurance commissioners in alliance with their constituent insurance agent trade associations seek to deprive federal instrumentalities³ of powers and authorities granted to them by explicit federal law, to deprive insurance *companies* (as distinguished from insurance *agents*) of potential business opportunities to secure for themselves a more effective and efficient distribution system for their products, and to deprive the American consumer of the benefits of increased competition for their insurance business.

Your amici, on behalf of themselves and their members, maintain that states have ample rights to regulate business entities within their own jurisdictions on matters not

³ "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties, for the performance of which they were created." *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896).

covered already by federal law, and that national banks are subject to sufficient business and consumer regulation by virtue of comprehensive federal law⁴ and implementing rules adopted by the federal agencies chartered by the United States Congress for the very purpose of overseeing *all* the activities of national banks.

No valid public policy interests would be served by permitting state insurance commissioners to superimpose yet another, often Draconian, layer of "regulation" upon national banks, especially where to do so would manifestly defeat the Congressional purpose in enacting the federal law granting national banks located and doing business in small towns the power to act as agents in the sale of insurance. As we discuss in detail below, there is likewise no *legal* reason to conclude that plenary authority to regulate insurance agency activities of national banks is reserved for the states in derogation of long-standing federal law.

SUMMARY OF THE ARGUMENT

This case ultimately revolves around the proper and reasonable interpretation of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The McCarran-Ferguson Act provides that federal law does not invalidate, impair or supersede a

⁴ *See, for example*, 12 U.S.C. § 1972. That statute makes it unlawful for a bank to condition the extension of credit upon a customer's purchase of an insurance product from the bank or one of its affiliates--the alleged fear of which is said to have prompted the enactment of state anti-affiliation statutes as discussed below.

state law enacted for the purpose of regulating the business of insurance unless the federal law in question specifically relates to the business of insurance.

The applicable federal law, 12 U.S.C. § 92,⁵ self-evidently "relates" to the business of insurance--and does so "specifically"--if the business of an insurance *agent* is deemed to be within the scope of the McCarran-Ferguson Act's term "business of insurance." Using the word "insurance" five times, as it does, Section 92 unambiguously grants to national banks located and doing business in places with a population that does not exceed 5,000 the authority to act as agent in the sale of insurance. Nothing more could be, or is, required for Section 92's terms to fit precisely within the plain meaning of the McCarran-Ferguson Act's "specifically relates" language. That being the case, Section 92 preempts contrary state law--even a state law that regulates the business of insurance--under the terms of the McCarran-Ferguson Act itself. The plain meaning of the statute, after all, is what governs the outcome of this litigation. *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-375 (1986).

⁵ In 1916, Congress added an unnumbered paragraph, as an amendment, to Section 13 of the Federal Reserve Act of 1913. The strange history of this paragraph is described at length in this Court's opinion in *U.S. National Bank of Oregon v. Independent Insurance Agents of America*, 113 S. Ct. 2173 (1993). The paragraph has come to be popularly known as "Section 92" and this brief will, for convenience, refer to it as such.

In this case, the relevant state law is not one enacted for the purpose of regulating the business of insurance, and consequently the McCarran-Ferguson Act does not apply by its own terms. Like all similar state anti-affiliation statutes, Florida's contribution to the discussion was enacted under the political importunings of insurance agent lobbyists as an anti-competitive act of self preservation having nothing to do with the actual "regulation" of anything. Notwithstanding the real purpose for enacting the state statute, to the extent that it *in fact* "regulates" anything, it is the *banking* business that is subject to the strictures of the law, not any entity that is engaged in the business of insurance. In addition, it is only the effort of national banks to act as insurance *agents* that is allegedly barred by the relevant state law, whereas the McCarran-Ferguson Act pertains only to the business of insurance. The business of insurance and the business of insurance agency are different things in law and in fact.

Assuming that Section 92 preempts contrary state law in this case, the extent of that preemption should be determined as well, and determined in such a fashion as to make clear that the states may not impose upon national banks any discriminatory treatment with respect to their licensing as insurance agents.

ARGUMENT

I. SECTION 92 SPECIFICALLY RELATES TO INSURANCE

Section 92 of Title 12, U.S.C., provides that

[i]n addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other *insurance* company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling *insurance* and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the *insurance* company for which it may act as agent: *Provided, however,* That no such bank shall in any case assume or guarantee the payment of any premium on *insurance* policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for *insurance*.

Notwithstanding the repeated use of the word "insurance" in the actual text of the statute, the Eleventh Circuit below "conclude[d] 'that section 92 neither 'specifically relates to the business of insurance,' 15 U.S.C. § 1012(b), nor 'specifically requires,'...that apparently conflicting state laws be preempted.'" *Barnett Bank of Marion County, N.A., v. Gallagher*, 43 F.3d 631, 637 (11th Cir. 1995)(citation omitted). The Eleventh Circuit further

concluded that when Congress enacted Section 92, in 1916, it "could not have been attempting to *regulate* a business that it believed it had no power to *regulate*. Congress was concerned with banking, not insurance." *Id.*

The court's decision is entirely devoid of any *analysis* that supports its conclusion concerning the phrase "specifically relates to the business of insurance," which is the only term that actually appears in the relevant text of the McCarran-Ferguson Act. The court's analysis was limited to a determination of whether Section 92 somehow specifically "required" preemption of state law and a determination whether Section 92 "regulated" insurance. Those were irrelevant and inappropriate considerations, since "required" and "regulate" are words that do not appear in the actual text of the relevant part of the statute. Nor are the words "regulates" or "requires" synonymous with each other or with the actual word in the statute, "relates."

Rather than attempting to interpret and apply the word "relates" (other than in its summary conclusion) the court below instead erroneously attempted to apply a phrase from this Court's decision in *United States Department of the Treasury v. Fabe*, 113 S. Ct. 2202 (1993) in order to determine the outcome of this case. In *Fabe*, a case having nothing to do with the issues now before the Court,⁶ the

⁶ With respect to the "specifically relates" prong of the McCarran-Ferguson test, the *Fabe* opinion is dictum. The parties in that case themselves agreed that the federal statute in question did *not* specifically relate to the business of insurance. *Id.* at 2208. It is a weak reed upon which to

majority wrote that:

state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically *requires* otherwise.

Id. at 2211 (emphasis added).

That the *Fabe* decision does not address the proper interpretation and application of the "specifically relates" prong of the McCarran-Ferguson test is demonstrated graphically by a subsequent decision of this Court in a case where the second prong of McCarran-Ferguson actually *was* in issue. In *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517 (1993), without even *mentioning* the six-month old *Fabe* decision, this Court held that a federal statute, the Employee Retirement Income Security Act, preempted contrary state "insurance" laws.

ERISA did not "regulate" the business of insurance⁷

hang such an important decision, for as this Court has cautioned, there is a "need to distinguish an opinion's holding from its dicta." *U.S. National Bank of Oregon v. Independent Insurance Agents of America*, 113 S. Ct. 2173, 2186 n. 11 (1993).

⁷ In fact, no federal statute "regulates" the business of insurance since the McCarran-Ferguson Act decreed, as a matter of federal policy, that "regulation" of the business of insurance would be left to the states. Consequently, if the

in the sense that the Eleventh Circuit uses the term. Rather, it concerned pensions and taxation. Nothing in ERISA "specifically required" the preemption of state laws as the Eleventh Circuit uses the term. Indeed, the statute is internally contradictory on that very point: On the one hand, 29 U.S.C. section 1144(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." On the other hand, 29 U.S.C. section 1144(b)(2)(A) provides that ERISA shall not "be construed to exempt or relieve any person from any law of any State which regulates insurance...."

Nevertheless, ERISA was given preemptive effect over contrary state laws because it *did* do all that the McCarran-Ferguson Act required it to do in order to achieve that status:

ERISA, both in general and in the guaranteed benefit policy provision in particular, obviously and specifically relates to the business of insurance. (citation omitted). Thus, the McCarran-Ferguson Act does not surrender regulation exclusively to the States so as to preclude the application of ERISA to an insurer's actions under a general account contract.

Eleventh Circuit is right in holding that a federal statute must "regulate" the business of insurance in order to "specifically relate" to the business of insurance, then the second prong of the McCarran-Ferguson test becomes entirely meaningless: no federal law would ever preempt a state insurance law short of an outright repeal of the McCarran-Ferguson Act.

Id. at 525.

The only apparent basis for the Court to have held that ERISA "obviously and specifically relates to the business of insurance" is the fact that in the actual text of ERISA there are references *to* insurance and insurance products. That is true of Section 92 as well,⁸ and for this Court to so hold again here would be entirely consistent with its own recent precedents construing variants of the word "relates." In *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), for example, the Court held that:

[t]he ordinary meaning of ["relating to"] is a broad one-- "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with,..."--and the words thus express a broad preemptive purpose....Petitioner contends that § 1305(a)(1) only preempts the States from actually prescribing rates, routes or services. This simply reads the words "relating to" out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to "regulate rates, routes and services."

Id. at 2037-2038 (emphasis in original, citations omitted.) (See also *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 47 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983).)

⁸ By way of contrast, in the statute at issue in *Fabe* there were no such references to insurance.

The legislative history of the McCarran-Ferguson Act likewise confirms that Congress intended a more liberally applied test for federal preemption in the insurance context than the one fabricated by the court below, by virtue of the deliberate choice of the word "relates" rather than "requires" or "regulates." Indeed, Congress specifically rejected proposed language in an earlier draft of the bill that became the McCarran-Ferguson Act that would, if enacted, have done what the court below says it did anyway. Both the House and Senate versions of the legislation provided that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance or which imposes a fee or tax upon such business, unless such Act *specifically so provides*." 91 CONG. REC. 488 (1945) (Senate) (emphasis added); *id.* 1085-94 (House). Had Congress enacted that language, a federal act would have to expressly *provide* that it invalidates, impairs, or supersedes state law in order to have preemptive effect. The conference committee, however, changed this language, and instead required that a federal law need only "*specifically relate to the business of insurance*" in order to "invalidate, impair or supersede" a state law. H.R. Rep. No. 213, 79th Cong., 1st Sess. 1 (1945) (conference report). Aside from turning the plain language of the actual enacted McCarran-Ferguson Act on its head, the court below did violence to the history of the law as well.

It is clear from application of recent precedent of this Court that Section 92 specifically relates to the business of insurance *agency*. Whether it specifically relates to the business of *insurance* is a question that requires an additional

analytical step, but we suggest that it is a merely academic one.

This Court has written, in dicta, that matters pertaining to "the licensing of [insurance] companies and their *agents* ... are also within the scope of [McCarran-Ferguson]." *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). If that is so, then obviously a federal statute that "relates" to the business of an insurance agent is one that likewise "relates" to the business of insurance, and is entitled to preemptive effect under the terms of the McCarran-Ferguson Act itself.

Conversely, as we develop more fully below, this Court's most precise definition of "the business of insurance," *Union Labor Life Insurance Company v. Pireno*, 458 U.S. 119 (1982), would not seem to leave much room within that definition for mere agents. Rather, it seems limited to activities in which the parties engage as principal. If that is so, then a state law that "regulates" the business of an insurance *agent* would not fit within the McCarran-Ferguson Act's "business of insurance" language at all, and normal rules of federal preemption would apply to this controversy.⁹

⁹ We suggest that the normal rules of federal preemption apply in this case in any event, and dictate that Section 92 supersedes the Florida anti-affiliation statutes at issue here. In *John Hancock, supra*, this Court held that there was

no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter

In either event, Section 92 preempts contrary state law.

II. THE FLORIDA ANTI-AFFILIATION STATUTE IS NOT A LAW ENACTED FOR THE PURPOSE OF REGULATING THE BUSINESS OF INSURANCE

In the preceding section of this brief, we demonstrated that Section 92 "specifically relates" to insurance, whatever definition is given to the statutory term,

traditional preemption analysis. State law governing insurance generally is not displaced, but "*where [that] law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress, federal preemption occurs.*" (Emphasis added.) ... [I]n the case of a direct conflict, federal supremacy principles require that state law yield.

Id. at 526 (citations omitted).

It is all but self-evident that Congress had some goal in mind when it enacted the statute in 1916 providing that national banks *may* act as agent in the sale of insurance, and that whatever goal that was, it is thwarted entirely by a state law providing that national banks *may not* do so. As in *John Hancock*, a case of direct conflict is presented here, the state law stands as an obstacle to the objectives of Congress, and the state law must therefore yield. See *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153-155 and 162 (1982).

"business of insurance." It is, therefore, entitled to preemptive effect under the explicit terms of the McCarran-Ferguson Act itself. Should the Court so hold, that determination would be dispositive of this case in and of itself. Doing so, however, would not resolve the conflicts among lower courts over how to apply the term "business of insurance" in the context of state anti-affiliation statutes. Those conflicts would continue and would require resolution by this Court in a future proceeding involving a national bank's power to offer "insurance" products as agent over the objection of a state is premised not on Section 92, but rather on some other source of authority such as 12 U.S.C. Section 24(Seventh), the "incidental powers" clause for national banks. *See NationsBank v. VALIC*, 115 S. Ct. 810 (1995). That continuing conflict would be resolved by this Court's determination that state anti-affiliation statutes are *not* "enacted for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act. That issue is properly before the Court, has been fully briefed, and is ripe for decision. We respectfully urge the Court to resolve it in this case.

The court below held that Section 626.988 of the Florida Statutes, as applied to the authority of national banks to engage in the insurance agency business in Florida, is a state law enacted for the purpose of regulating the business of insurance, and is therefore protected from preemption by Section 2(a) of McCarran-Ferguson. To the contrary, Section 626.988 of the Florida statutes is not such a law for at least three reasons: (a) It is a law designed for the purpose of excluding new and effective competitors from the preexisting insurance agency market in Florida; (b) It has

the effect of regulating the business of banks, bank holding companies, savings and loans, savings and loan holding companies and savings and loan service corporations, none of which is an entity within the insurance industry as required by this Court's controlling holding in *Pireno*, 458 U.S. at 129; and (c) The exclusion of anyone from the business of an insurance *agent*, whatever its intrinsic merits, is not the regulation of the business of insurance itself.

A. WHAT THE LEGISLATURE'S PURPOSE WAS

The intent of the state legislature in enacting the statute is a key element in determining whether it fits both within the McCarran-Ferguson Act's language and this Court's holding that statutes *aimed* at protecting the relationship between insurer and insured are statutes regulating the business of insurance.¹⁰ A Florida appeals court has described the "intent" of the legislature in this case:

Concerns regarding financial institutions entry into insurance activities, including the prevention of coercion, unfair trade practices, and undue concentration of resources, existed at the time of passage of the statute and remain valid today.

Glendale Federal Savings & Loan v. Department of Insurance, 587 So.2d 534, 536 (Fla. 1st DCA 1991), *rev. denied*, 599 So.2d 656 (Fla. 1992).

¹⁰ *Securities & Exchange Commission v. National Securities, Inc.*, 393 U.S. at 460.

Not uncharacteristically, the above passage reflects--at best--a mixed motive on the part of the legislature. To the extent that there was a concern for "undue concentration of resources" in financial institutions, the "intent" of the legislature had no conceivable link to the regulation of the business of insurance. That had to have been the dominant intent of the legislature here, because the actual enacted laws deal with the other expressed concerns in an entirely irrational manner:

○ Section 92 allows national banks in small towns to act as agent in the sale of any insurance. Sales need not be to existing customers at all. A national bank-affiliated insurance agent can sell insurance policies to noncustomers who have never set foot in the bank itself and have no intention of doing so. Certainly there could not rationally be any element of "coercion" or "unfair trade practices" unique to banking under such a scenario. Where "coercion" allegedly is a concern (if only in the minds of insurance agent trade associations and insurance commissioners) it would only be in the area of credit-related insurance where prospective bank borrowers allegedly may feel that the loan approval process may be affected by whether they buy credit insurance from the bank.¹¹ Still, the Florida legislature chose to *allow* banks to sell "credit life insurance and credit

¹¹ A General Accounting Office study in September 1990 found only anecdotal evidence of any coercion by banks in the sale of insurance. An overwhelming majority of surveyed customers who purchased credit insurance thought it was a good product and would purchase it again; even among those borrowers who did not purchase credit insurance, over half thought it was a good product. *Bank Powers: Issues Relating to Banks Selling Insurance* (GAO/GGD-90-113) at 21-22.

disability insurance"--the forms of insurance that would be most susceptible to tie-ins (but for federal law prohibiting such tie-ins, 12 U.S.C. § 1972)--while prohibiting, in part, the sale of insurance *not* susceptible at all to tie-ins, to noncustomers who could not be tied in to anything. Fla. Stat. ch. 626.988(1)(b).

○ The Florida statute was enacted in 1974. If there was, at that time, a true "concern" over "coercion" or "unfair trade practices" by banks in the sale of insurance, one must assume that a reasonable response by the legislature would have been to prevent those entities that had engaged in such coercion or unfair trade practices from doing so in the future. The Florida legislature did exactly the opposite. It "grandfathered" the insurance agency activities of *all* the financial institutions then engaged in the business. The prohibition in the statutes runs *only* to those banks that had not been engaged in the business (and, therefore, could never possibly have coerced anyone). Fla. Stat. ch. 626.988(5).

○ Notwithstanding the alleged concerns of the legislature about "coercion" and "unfair trade practices" that are said to justify the application of this state statute to a national bank located in a town of fewer than 5000 population (despite conflicting federal law), the fact is that the Florida law *specifically allows* banks in towns of fewer than 5000 population to act as the agent in the sale of insurance. Fla. Stat. ch. 626.988(1)(a). The only small-town banks excluded from the insurance business are those owned by holding companies. There is no evidence anywhere that the legislature thought holding company-owned banks were inherently "coercive," whereas

independent small town banks were not.¹²

The statute is entirely about preventing "concentration of resources" in effective competitors, the banks, for the protection of the market share now held by the independent agent constituents of the elected Insurance Commissioner. That has nothing to do with regulating the business of insurance. It has to do entirely with hamstringing the business opportunities of the banking industry granted by federal law.

We do not denigrate the policy choices made by the Florida legislature. A great deal of legislation, both at the state and the national level, deals with the regulation of

¹² Florida is by no means alone in adopting anticompetitive legislation in this area under the cover of "consumer protection," and then actually acting in an inconsistent fashion with the announced "intent" of the legislation. In Kentucky, for example, the anti-affiliation statute actually permits the sale of insurance by a bank so long as no one entity owns more than half of the bank. Ky.Rev.Stat. § 287.030(4). See *Brief of Respondents in Stephens v. The Owensboro National Bank*, (U.S. No. 95-74, September 13, 1995) at 10-12. Similarly, Louisiana "grandfathers" banks that were engaged as general insurance agents on January 1, 1984, see La. R.S. 6:242(A)(6), and permits every other form of depository institution to act as agent in the sale of insurance. See La. R.S. 6:902(B); La. R.S. 6:644(B)(9). The Fifth Circuit has described the distinction between banks and others in this respect as "seemingly...irrational." *American Bank & Trust Co. of Opelousas v. Dent*, No. 93-5040 (5th Cir. 1994) Slip op. at 8.

competition and the prevention of undue concentration of economic or other power in too few hands. In the abstract, there is nothing wrong or irrational about such legislation. We merely point out that the federal legislature has made a conflicting choice, for good and valid public policy reasons of its own. Under the Supremacy Clause of the Constitution, it is the federal choice that must be honored, and the McCarran-Ferguson Act, correctly applied, does not change that result. It preserves from preemption only laws enacted for the purpose of regulating the business of insurance, not laws enacted for the purpose of regulating competition. On virtually identical facts, the Third Circuit has held, correctly in our view, that the Pennsylvania anti-affiliation statutes, purportedly enacted to regulate insurance, were in actuality designed "to prevent competition between insurers and Pennsylvania financial institutions." As such, the McCarran-Ferguson Act did not preserve those statutes. *United Services Automobile Association v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

B. WHAT BUSINESS IS ACTUALLY REGULATED

The sale of insurance, as agent, by national banks located and doing business in small towns is a part of the business of banking. Virtually every court that has examined this issue has so concluded:

○ "The 'business of insurance' has been narrowly defined, and it seems fairly obvious that § 92 does not constitute Congressional regulation of that business. That section is a part of the National Bank Act, and its function is to grant additional powers to national banks. That the power granted to national banks involves insurance does not transform this section into the regulation of the business of

insurance....Just as § 92 does not regulate the business of insurance, neither does Ky. Rev. Stat. 287.030(4) constitute insurance regulation....It relates to the powers of bank holding companies, not to the powers of insurance companies or agents." *Owensboro National Bank v. Moore*, 803 F. Supp. 24, 36 (E.D. Ky. 1992); *aff'd*, 44 F.3d 388 (6th Cir. 1994), *petition for cert. pending*, No. 95-74. (Cited with approval in *Barnett Bank of Marion County v. Gallagher*, 839 F. Supp. 835, 843 (M.D. Fla. 1993), *aff'd*, 43 F.3d 631 (11th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3238 (U.S. September 27, 1995)(No. 94-1837) and in *First Advantage Insurance v. Green*, 652 So. 2d at 573.

○ "But § 92 in no way governs the manner in which the business of insurance is conducted; rather it merely helps to define the powers of national banks....Section 287 [Ky. Rev. Stat.]...helps to define the powers of Kentucky bank holding companies by excluding such companies from participation in the activities that constitute 'the business of insurance.'" *Owensboro National Bank v. Stephens*, *supra*, 44 F.3d at 391-392.

○ "[B]ecause the debt cancellation contracts offered by FNB fall within the incidental powers granted by the National Bank Act, they do not constitute the 'business of insurance' under the McCarran-Ferguson Act....[T]he McCarran-Ferguson Act was not directed at the activities of national banks." *First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 779 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990).

○ "[W]hen Congress enacted section 92 in 1916... Congress was concerned with banking, not insurance." *Barnett Bank of Marion County v. Gallagher*, 43 F.3d at 637.

○ "[A]ffiliation between insurers and banks has no integral connection to the relationship between the insured and insurer; and banks are not entities within the insurance industry. Regulations such as section 641 [of the Pennsylvania Insurance Act, forbidding the licensing as an insurer of any affiliate of a lending institution] have no part in the business of insurance under McCarran-Ferguson." *USAA v. Muir*, 792 F.2d at 364.

But if that is so, then self-evidently the effort of a state to dictate whether, when, how, or to what extent, a national bank may engage in the activity is an effort to regulate the business of banking, pure and simple. As above, there is nothing wrong, in the abstract, with a state's regulation of the banking business. But where the United States makes a different policy choice with respect to the regulation of that business than does a state, it is the federal choice that must be honored under the Supremacy Clause. The only exception to that general rule that is even arguably meaningful here is set forth in the McCarran-Ferguson Act. That law saves from preemption only those state laws that are designed to regulate the business of insurance, not state laws that regulate—as here—the business of banking.

C. REGULATION OF AGENTS VS. REGULATION OF PRINCIPALS

This Court has, several times, had occasion to describe what constitutes the "business of insurance" for purposes of the McCarran-Ferguson Act.

In *SEC v. National Securities, Inc.*, 393 U.S. at 460, this Court held that the

relationship between *insurer* and insured, the

type of policy which could be issued, its reliability, interpretation and enforcement—these were the core of the "business of insurance"...Undoubtedly, other activities of insurance companies relate so closely to their status as reliable *insurers* that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.

Accord, U.S. Department of the Treasury v. Fabe, 113 S. Ct. 2202, 2212 (1993).

In *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982), the Court elaborated on the above definition by setting forth a three-part test of what constitutes the business of insurance for McCarran-Ferguson Act purposes:

[F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the *insurer* and the insured; and third, whether the practice is limited to entities within the insurance industry.

Barnett Bank of Marion County is not an insurance company or an insurer; its subsidiary, Linda Clifford Insurance, Inc., is not an insurance company or an insurer; no national bank in a small town could—under current federal law—ever be an insurance company or insurer. Insurance companies are those that underwrite policies, collect

premiums and assume risks, *State ex rel. Reece v. Stout*, 65 S.W.2d 827, 829 (Tenn. App. 1933), not those companies that merely sell the products of insurance companies for fees and commissions. See, e.g., *Branson v. Prins Ins. Inc.*, 79 F.R.D. 662, 665 (D.S.D. 1978); *State ex rel. Meade v. Marion Superior Court*, 174 N.E.2d 408, 411 (Ind. 1961).

Fla. Stat. ch 626.988 can not be considered a statute "aimed at protecting the relationship between insurer and insured." It explicitly does *not* regulate any such relationship. It regulates (by prohibiting¹³) a relationship between a policyholder and an insurance agent, the bank's affiliate; it regulates (by prohibiting) a relationship between an insurance company and an insurance agent, the bank's affiliate.

An insurance *agent* is not a party to the relationship between an insurance company and a policyholder. The agent merely serves to bring those two parties together, much as a real estate agent or a securities broker bring buyers and sellers together without becoming a principal in the transaction. Indeed, all of the tests set forth by this Court for determining what is the "business of insurance" run necessarily to "insurers" or "insurance companies" only. Under those tests, the insurance *agency* business is separate and distinct from the insurance business. The McCarran-Ferguson Act pertains only to the latter.

¹³ The McCarran-Ferguson Act uses the word "regulate," but "regulate" does not mean "prohibit." *Black's Law Dictionary* (6th ed. 1990) at 1212 defines "prohibit" as "forbid by law; to prevent; - not synonymous with 'regulate.'" See also *Owensboro National Bank v. Stephens*, 44 F.3d at 392.

A state's efforts to regulate the business of an insurance agent, therefore, are entirely legitimate, clearly within the police powers of the state, supported by valid public policy considerations, and in all respects fitting and proper exercises of sovereign authority. But, like any other such state efforts, other than the regulation of "the business of insurance," state regulation of insurance agents is subject to preemption by conflicting federal law under traditional analyses of the Supremacy Clause.

III. STATES MAY NOT IMPOSE UNIQUE RESTRICTIONS ON NATIONAL BANK AFFILIATED INSURANCE AGENCIES

In the interests of judicial economy as well, we respectfully urge the Court, in the course of its decision in this matter, to enunciate clearly the principles by which state interference with national bank insurance agency activities can be judged. Assuming, for purposes of argument, that Section 92 is held to preempt contrary state laws for the reasons outlined above, it is still critical to go the extra step, so as to avoid an entirely unnecessary "next generation" of litigation over state control of the exercise of insurance agency powers by national banks.

Several of the state insurance commissioners around the country are exceptionally hostile to the involvement of banks in the insurance agency business. They will seize upon the smallest opening left available to them in any less-than-comprehensive court decision in order to deny in fact that which courts have held banks are entitled to in law.

○ In Indiana, for example, even though no state law imposed (or was alleged to impose) any limits on national bank insurance agency activities, the Commissioner

nevertheless, on her own initiative, insisted on limiting the market for such activities to residents of small towns. Litigation was required in order for the bank to establish its right to a broader market. *NBD Bank, N.A., v. Bennett*, ___ F.3d ____.

○ Even though this Court, this year, by unanimous vote, has held that sale of annuities does not constitute the sale of insurance, and that the sale of annuities is within the incidental powers of national banks,¹⁴ the Commissioner in Mississippi has refused to license a national bank to sell annuities. Litigation has resulted from that action as well. *Deposit Guaranty National Bank v. Dale*, Civil No. 95 CV 640 WS (S.D. Miss.).

○ After this Court's *VALIC* decision earlier this year, the State legislature in Louisiana, specifically authorized state banks to sell annuities "to the same extent as federally chartered banks," and mandated the Insurance Commissioner to license banks to do so. La. R.S. 6:242(A)(16), La. R.S. 22:1113(6).¹⁵ Yet to this day, the Commissioner routinely advises applicant banks that no such licenses can be granted to them pending issuance of a "directive" by the Insurance Department. The "directive" will apply only to bank-related agents, and will stand apart from normal licensing qualifications.

¹⁴ *NationsBank v. VALIC*, 115 S. Ct. 810.

¹⁵ Louisiana state law also provides for parity between state and national banks, conferring upon the state banking commissioner the power to grant state banks, by administrative rule, powers held by national banks. La. R.S. 6:242(C).

○ In Kentucky, the U.S. District Court ruled in favor of national banks on the very issues that are before the Court in this case; the Commissioner was directed to entertain insurance license applications from the plaintiff banks; no stay of the court's order was ever entered, and yet the Commissioner refused to do as ordered until contempt proceedings were initiated. *Owensboro National Bank v. Moore*, 803 F. Supp. 24.

○ In Ohio, the state Supreme Court, three years ago, plainly held that state statutes permitted the licensing of insurance agents affiliated with banks. *Independent Insurance Agents of Ohio v. Fabe*, 63 Ohio St. 3d 310, 587 N.E.2d 814 (1992). To this day, the Insurance Commissioner has refused to abide by that decision. Most recently, the state Supreme Court has been required to issue a writ of mandamus to him. *State ex rel. Huntington Insurance Agency v. Duryee*, 73 Ohio St. 3d 530, 653 N.E.2d 349 (1995).

○ In Florida, the initial reaction to this Court's VALIC decision was a proposed set of rules and regulations that would govern bank sales of annuities and that would be far more onerous than the rules applicable to other sellers of annuities in that state.¹⁶ Indeed, in the very case now before this Court, the Commissioner made an argument (that the lower courts did not reach) to the effect that a bank's Section 92 powers were limited to the residents of the small town in which the bank is located. That is an argument that will re-appear in this case in the absence of clear direction from this Court.

¹⁶ Florida Department of Banking & Finance, Rule 3C-100.960, Florida Administrative Code (August 24, 1995).

In short, it is obvious that insurance commissioners in many instances have used their licensing powers to deprive national banks of their federally granted authority. State efforts that frustrate, burden or impede the federal purpose are null and void. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 406, (1819). The commissioners' actions outlined above, to the extent at least that they treat national banks less favorably than other insurance agents licensed by the respective states, clearly do frustrate, burden and impede the federal purpose. The Commissioners need to be told that, explicitly, here and now. It serves no useful purpose for the Commissioners to be granted such a right. As indicated above, alleged concerns over "consumer protection" are already dealt with more than adequately at the federal level. In Section 92 itself, the Comptroller of the Currency is granted explicit rulemaking power over national bank insurance agency activities, and the Comptroller has, for at least some purposes, already adopted detailed regulations. See *Interagency Statement on Retail Sales of Nondeposit Investment Products*, February 15, 1994 (Reproduced at OCC NR 94-21, 2-17-94).

CONCLUSION

This case is not about an industry's effort to escape legitimate regulation. It is a case about an industry's effort to exercise a power that is specifically and explicitly made available to it by long-standing federal statutory law--a law that explicitly and specifically subjects the exercise of the granted powers to the regulation of a federal official, to the exclusion of other potential regulators. It is a case about a competitor industry's effort to preserve and protect its position in the marketplace through artificial restraints. In the absence of strong legal justifications for preventing competition, that is a matter that ought to be decided by the

free market instead. For the reasons indicated throughout this brief, amici respectfully suggest that there is no legal justification for depriving banks and the public of the benefits of competition. The Eleventh Circuit decision to the contrary should be reversed.

Respectfully submitted,

John J. Gill III
Counsel of Record
Michael F. Crotty
Mathew H. Street

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

Attorneys for Amici Curiae

November 9, 1995

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Supreme Court, U.S.
FILED
DEC 7 1995
OFFICE OF THE CLERK

No. 94-1837

**In The
Supreme Court of the United States
October Term, 1995**

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,
v.

**BILL NELSON, FLORIDA
INSURANCE COMMISSIONER, et al.,**
Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

**BRIEF OF NATIONAL ASSOCIATION
OF INSURANCE COMMISSIONERS AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

ELLEN DOLLASE WILCOX
*Counsel of Record for Amicus Curiae,
In Support of Respondents*
**National Association of
Insurance Commissioners
120 W. 12th Street
Suite 1100
Kansas City, Missouri 64105
816/374-7166**

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INTEREST OF AMICUS CURIAE

The National Association of Insurance Commissioners (NAIC) is a non-profit, unincorporated association whose members consist of the principal insurance regulatory officials of the 50 states, the District of Columbia, territories and insular possessions of the United States. The NAIC is interested in filing this Brief in furtherance of its objectives to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of insurance policyholders and claimants.

Following a request from the Florida Insurance Commissioner, the NAIC Executive Committee, which consists of seventeen insurance commissioners from various regions of the country, voted to file a Brief *Amicus Curiae* in this case, on behalf of the full NAIC membership. The Executive Committee encourages the Court to affirm the decision of the Eleventh Circuit Court of Appeals in *Barnett Bank of Marion County, N.A. v. Tom Gallagher, Fla. Ins. Comm'r*, 43 F.3d 631 (11th Cir. Jan. 30, 1995).

The NAIC emphasizes that the Florida law prohibiting bank subsidiaries and affiliates from transacting insurance in Florida, FLA. STAT. Ch. 626.988, regulates the business of insurance and preempts contrary federal law which allows national banks and their affiliates and subsidiaries to sell insurance in towns with less than five thousand residents. *See*, National Bank Act, 12 U.S.C. § 92 (1864).

State insurance departments began to regulate the business of insurance in 1851. 1851 N.H. Laws, C.1111.

When this Court held that insurance was commerce subject to federal regulation, *United States v. South-Eastern Underwriters' Ass'n*, 322 U.S. 533 (1944), the NAIC encouraged Congress to adopt legislation that would preserve the state insurance regulatory system without defeating federal anti-trust laws. See, Appendix to this Brief at App. 7, quoting 1945 NAIC Proc. 156 at 159, 160. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012 (1945), was adopted, based in large part on the NAIC's suggested language. See, McFall, *A Calendar of the South-Eastern Underwriters Association Case*, 265 Ins. L.J. 72 et seq. (1945). The NAIC is interested in honoring the original purpose of the McCarran-Ferguson Act, by preserving the state insurance regulatory system. Under the McCarran-Ferguson Act, State insurance departments and State legislators are responsible for establishing and enforcing State laws and policies regarding all aspects of the business of insurance. Additionally, State statutes charge individual insurance commissioners with the responsibility of regulating the business of insurance. See, e.g., FLA. STAT. Ch. 624.308.

The NAIC encourages the Court to affirm the decision of the Eleventh Circuit in *Barnett Bank v. Gallagher*, so that the sale of insurance will remain fully within the regulatory scope of authority of individual States, not the federal government. This is consistent with statutory law and common law and is in the best interest of insurance consumers whom State insurance commissioners are charged to protect.

SUMMARY OF THE ARGUMENT

The decision of the Eleventh Circuit in *Barnett Bank v. Gallagher* should be affirmed because the Eleventh Circuit correctly held that Florida law, FLA. STAT. Ch. 626.988, relates to the business of insurance while Section 92 of the National Bank Act does not. This led the Eleventh Circuit to properly conclude that Section 92 was preempted by the Florida law because the McCarran-Ferguson Act requires that State insurance laws are controlling unless a conflicting federal law specifically relates to the business of insurance.

ARGUMENT

I. STATE INSURANCE LAWS TYPICALLY PREEMPT CONTRARY FEDERAL LAWS.

The McCarran-Ferguson Act confirmed that States, not the federal government, are responsible for regulating the business of insurance. The Act states in part: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." McCarran-Ferguson Act, 15 U.S.C. § 1012(a). Accordingly, every State has adopted a comprehensive set of insurance laws and regulations. See, e.g., FLA. STAT. Ch. 624-651. Congress intended that State laws and regulations would primarily control the regulation of the business of insurance. Federal laws control the regulation of the business of insurance only in limited circumstances. This is because the McCarran-Ferguson Act states in part: "No Act of Congress shall be construed to invalidate, impair,

or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . . " McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

A. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT THE MCCARRAN-FERGUSON ACT CREATES A REVERSE PREEMPTION DOCTRINE THAT FAVORS STATE INSURANCE LAWS.

The Eleventh Circuit found that: "This statutory scheme [the McCarran-Ferguson Act] creates a reverse-preemption doctrine for insurance regulation. That is, a state statute that regulates insurance presumptively preempts a contrary Congressional statute unless the Congressional statute specifically relates to insurance." *Barnett Bank v. Gallagher* at 634. Similarly, the Ninth Circuit has found that the McCarran-Ferguson Act creates an "inverse preemption" which requires that general federal laws do not preempt State insurance laws. *Merchants Home Delivery Serv. v. Reliance Group Holdings*, 50 F.3d 1486 (9th Cir. 1995).

The plain language of the McCarran-Ferguson Act supports the theory of the reverse-preemption, or inverse preemption, doctrine because Congress specified in the Act that States shall regulate the business of insurance unless a particular federal law applies and specifically relates to the business of insurance. McCarran-Ferguson Act, 15 U.S.C. § 1012.

B. LEGISLATIVE HISTORY OF THE MCCARRAN-FERGUSON ACT INDICATES THAT CONGRESS INTENDED TO PRESERVE STATE INSURANCE LAWS.

Legislative history of the McCarran-Ferguson Act indicates that the Act was intended to preserve state insurance laws and regulations. In 1944, this Court held that insurance was commerce subject to federal regulation. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533. Subsequently, Congress adopted the McCarran-Ferguson Act to reaffirm the authority of States to regulate insurance. A House report gives the following account of Congressional intent:

Inevitable uncertainties which followed the handing down of the decision in the *Southeastern* [sic] *Underwriters Association* case, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.

. . . [The House] committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. H.R. Rep. No. 68, 79th Cong., 1st Sess. 2 (1945).

Historical NAIC accounts provide further evidence that the State insurance commissioners urged Senators McCarran and Ferguson to adopt federal legislation that would allow State insurance laws to remain valid and

honor federal antitrust laws at the same time. In 1945, the insurance commissioners reported to their colleagues that: "The decision of the United States Supreme Court in the *South-Eastern Underwriters* case confronted Congress, the State Legislatures and the Insurance Commissioners with a problem – the task of preserving State regulation and at the same time not emasculating the federal anti-trust laws." Appendix to this Brief at App. 7, quoting 1945 NAIC Proc. 156 at 159, 160.

This Court has similarly found that the purpose of Congress in enacting the McCarran-Ferguson Act was to adopt "legislation that would ensure that the States would continue to have the ability to tax and regulate the business of insurance." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 at 218 (1979).

C. THE SUPREME COURT PRESUMES CONGRESS DID NOT INTEND TO SUPPLANT STATE LAW.

Furthermore, the Supreme Court has previously explained its presumption in favor of State laws. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, (April 26, 1995), this Court reminded the public that the Supremacy Clause of the U.S. Constitution, Article VI, dictates that federal law may preempt State law expressly, impliedly, or when State and federal laws conflict. *New York Blue Cross v. Travelers* at 1678, citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 203-204 (1983) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Despite the Supremacy clause, however,

this Court explained that it reviews charges of federal preemption with "the starting presumption that Congress does not intend to supplant state law." *New York Blue Cross v. Travelers* at 1678. Additionally, in "fields of traditional state regulation" like insurance, this Court has "worked on the 'assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* (citations omitted). This reasoning supports the Eleventh Circuit's theory of a reverse-preemption doctrine for insurance regulation and invalidates the Sixth Circuit's reliance on the Supremacy Clause to hold that a Kentucky law prohibiting banks from acting as insurance agents was preempted by Section 92. *Owensboro Nat'l Bank v. Don W. Stephens, Comm'r, Dep't of Ins., Commonwealth of Ky.*, 44 F.3d 388 (6th Cir. Dec. 29, 1994).

II. UNDER THE MCCARRAN-FERGUSON ACT, FLORIDA LAW IS PROTECTED FROM PREEMPTION BY SECTION 92.

The Eleventh Circuit reviewed this Court's interpretations of the "business of insurance" under the McCarran-Ferguson Act beginning with this Court's most recent relevant decision: *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993). The Eleventh Circuit summarized *Fabe* as follows: "In *Fabe*, the Supreme Court held that an Ohio statute that accorded policyholders priority over an insolvent insurance company's other creditors was a law enacted to regulate the business of insurance because it regulated policyholders and their relationship

to the insurance company." *Barnett Bank v. Gallagher* at 635, citing *Fabe* at 2210.

In preemption cases involving state insurance laws, the requirement that a state law focus on the relationship between an insurer and its policyholders is derived from this Court's decision in *S.E.C. v. Nat'l Sec., Inc.*, 393 U.S. 453 (1969). In that case, the Supreme Court considered whether an Arizona law designed to protect insurance company shareholders was spared from federal preemption under the McCarran-Ferguson Act. The Court held in *S.E.C.*:

The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement - these were the core of the "business of insurance" [as used within McCarran-Ferguson]. Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class.

But whatever the exact scope of the statutory term, it is clear where the focus was - it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance." *Id.* at 460.

As proven in Section III.B. of this Brief, the Florida law clearly regulates the relationship between policyholders and their insurers. Therefore, under the Court's interpretation of the McCarran-Ferguson Act in *S.E.C.*, the Florida law is protected from preemption by Section 92.

The *Fabe* case also details the Supreme Court's *Pireno* test for determining whether a particular statute involves the "business of insurance." *Fabe* at 2207. In *Pireno*, the Court considered: "First, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. *Fabe* at 2207, citing, *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). Here, the Florida law satisfies the *Pireno* test because: (1) it regulates the sale of insurance policies which spread policyholder risk; and (2) the Florida law was intended to protect policyholders from potentially abusive bank sales practices; and (3) sale of insurance products is limited by law to licensed insurance entities.

Section 92, however, fails to satisfy the *Pireno* test because it was not intended to protect insurance policyholders; instead, it was intended to provide small-town banks with an additional source of revenue. Letter from Comptroller John Skelton Williams to Sen. Robert L. Owen, reprinted in 53 Cong. Rec. 11001 (1916).

The *Fabe* decision focuses on the issues of whether the State law regulates the policyholder's relationship with its insurer and whether the federal law specifically requires that State law is inapplicable. *Barnett Bank* at 636, citing *Fabe* at 2211. Here Section 92 certainly does not specify that state insurance laws are inapplicable. Therefore, the Eleventh Circuit properly held that Florida law is not preempted by Section 92.

III. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT FLORIDA LAW REGULATES THE BUSINESS OF INSURANCE.

A. THE FLORIDA LAW IS PART OF THE UNFAIR INSURANCE TRADE PRACTICES ACT.

The Florida law disallows bank subsidiaries and affiliates from transacting insurance in Florida. FLA. STAT. Ch. 626.988. This provision provides, in pertinent part:

(2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution [including any bank or bank holding company, or any subsidiary, affiliate, or foundation thereof] shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency. FLA. STAT. Ch. 626.988(2).

This provision is part of the Unfair Insurance Trade Practices Act in the Florida Insurance Code. The stated purpose of the Unfair Insurance Trade Practices Act is:

. . . to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in . . . [the McCarran-Ferguson Act], by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. FLA. STAT. Ch. 626.951.

The Florida Unfair Insurance Trade Practices Act is based largely on the NAIC model Unfair Trade Practices Act, NAIC Model Laws, Regulations and Guidelines, Vol. IV, pp. 880-1 to 880-13 (1994), reprinted in the Appendix to this Brief at App. 9, which regulates insurance marketing by banks. NAIC model laws are developed by insurance regulators and interested parties in a quasi-legislative process. Many State legislatures subsequently adopt the NAIC model laws in whole, or in part, or with slight modifications as the Florida legislature did with the NAIC model Unfair Trade Practices Act. Every State has an unfair insurance trade practice act or related legislation¹ because such laws are considered important for the protection of policyholders and the proper regulation of the business of insurance, pursuant to the McCarran-Ferguson Act. *See, e.g.* FLA. STAT. Ch. 626.951.

One indication that the Florida law regulates the business of insurance is that the law is part of the Unfair Insurance Trade Practices Act, which obviously relates to insurance. The Eleventh Circuit cautioned, however, that this Court has previously warned against undue reliance on location of a statute as an indication of the statute's purpose. *Barnett Bank v. Gallagher* at 634, citing, *Fabe* at 2210. In the *Fabe* case, this Court said one must inquire whether the statute's aim is to regulate an essential part of the business of insurance and, in particular, the relationship between policyholders and their insurance

¹ See list of citations to all State unfair insurance trade practices acts in Appendix to this Brief, App. 36 through App. 42.

companies. *Barnett Bank v. Gallagher* at 635, citing, *Fabe* at 2212.

B. THE FLORIDA LAW REGULATES THE RELATIONSHIPS BETWEEN POLICYHOLDERS AND THEIR INSURERS.

The Eleventh Circuit relied in part on two lower Florida court interpretations of FLA. STAT. Ch. 626.988. *Barnett Bank v. Gallagher* at 636. Both of the lower court decisions express concern that policyholder relationships with their insurers could be harmed by abusive insurance sales practices of banks. More specifically, the Florida court said: "Concerns regarding financial institutions' entry into insurance activities, including the prevention of coercion, unfair trade practices, and undue concentration of resources, existed at the time of passage of the statute and remain valid today. . . ." *Glendale Fed. Sav. & Loan Ass'n v. Fla. Dep't of Ins.*, 587 So.2d 534, 536 n.1 and 537 (Fla. 1st Dist. Ct. App. 1991), reh'g denied, 599 So.2d 656 (Fla. 1992). In the second cited Florida case, the court wrote: "The Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest." *Prod. Credit Ass'ns of Fla. v. Fla. Dep't of Ins.*, 356 So.2d 31, 32 (Fla. 1st Dist. Ct. App. 1978).

The Eleventh Circuit also cited testimony from the *Barnett* trial which indicated that if banks sell insurance, bank customers might be pressured into purchasing unnecessary insurance and insurance companies might be pressured into assuming unwise insurance risks. This

potential for abuse stems from the "loss of arms-length transactions and objectivity when the bank becomes involved with insurer and insured." *Barnett Bank v. Gallagher* at 636. The Eleventh Circuit, like the trial court, found that the Florida law was intended to indirectly provide regulatory protection for policyholders against such marketplace abuse.

As this Court has previously held, "Statutes aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly, are laws regulating the 'business of insurance.'" *S.E.C. v. Nat'l Sec., Inc.*, 393 U.S. 453 at 460 (1969). See, also, Section II of this Brief.

IV. SECTION 92 OF THE NATIONAL BANK ACT DOES NOT RELATE TO THE BUSINESS OF INSURANCE.

Section 92 of the National Bank Act provides that national banks located in towns with less than five thousand residents may solicit, sell, and collect premiums on insurance products. Additionally, Section 92 provides that bank employees acting as insurance agents may receive fees or commissions for such sales. 12 U.S.C. § 92.

Barnett Bank erroneously argues that Section 92 preempts the Florida law because Section 92 specifically relates to the business of insurance and that under the McCarran-Ferguson Act, Section 92 invalidates the Florida law. However, as the Eleventh Circuit pointed out, the National Bank Act, 12 U.S.C. §§ 21-216d (1864), concerns banking, not insurance. The Eleventh Circuit properly relied on this Court's finding that Section 92 was adopted

"at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause." *Barnett Bank v. Gallagher* at 637, citing, *Fabe* at 2212. When Section 92 was adopted, *Paul v. Virginia*, 75 U.S. 168 (1868) was controlling and was understood by Congress to place regulation of insurance outside Congressional power established by the Commerce Clause of the U.S. Constitution, Article I, § 8, cl. 3. Therefore, Congress could not have intended Section 92 to relate to the business of insurance. Instead Congress enacted Section 92 to regulate certain activities of national banks and that is exactly what it does.

CONCLUSION

The Eleventh Circuit properly held that FLA. STAT. Ch. 626.988 remains valid law. This law prohibiting banks from transacting insurance in Florida is not preempted by Section 92 of the National Bank Act which allows national banks to sell insurance in small towns. Instead, the McCarran-Ferguson Act protects the Florida insurance law from preemption. For these and all the other reasons detailed in this Brief, the National Association of Insurance Commissioners respectfully requests that the Court affirm the decision of the Eleventh Circuit in *Barnett Bank*

of Marion County, N.A. v. Tom Gallagher, Fla. Ins. Comm'r,
43 F.3d 631 (11th Cir. Jan. 30, 1995).

Respectfully submitted,

ELLEN DOLLASE WILCOX
Counsel of Record for
Amicus Curiae,
In Support of Respondents
National Association of
Insurance Commissioners
120 West 12th Street
Suite 1100
Kansas City, Missouri 64105
816/374-7166

APPENDIX

1945 NAIC Proceedings

**INTERIM REPORT OF THE SUB-COMMITTEE ON
FEDERAL LEGISLATION OF THE EXECUTIVE
COMMITTEE OF THE NATIONAL ASSOCIATION
OF INSURANCE COMMISSIONERS**

June 5, 1945

On March 9, 1945, S. 340, the so-called insurance bill, became law when President Roosevelt affixed his signature thereto. . . .

Following the preparation of the Commissioners' legislative proposal with its attached memorandum of explanation in November, 1944, Commissioner Johnson, by direction of the December, 1944 meeting of the National Association of Insurance Commissioners proceeded to Washington accompanied by Commissioner Harrington, Chairman of the Sub-committee on Federal Legislation. A series of conferences was held with members of Congress, the Attorney General and representatives of the insurance business.

At the time the 78th Congress was drawing to a close. It was the consensus of opinion that immediate legislative relief was required because existing state regulatory and taxing statutes were being questioned and in some respects challenged. Believing that unanimity of opinion would produce legislation in the 78th Congress, Commissioners Johnson and Harrington, acting for the Commissioners, consented to a compromise draft of the Commissioners' legislative proposal. . . . This measure was introduced on the last day of the session by Senators McCarran and Ferguson. On the same day Senators O'Mahoney and Hatch introduced another bill. . . .

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Neither of these measures was acted upon before the termination of the 78th Congress. Commissioners Johnson and Harrington in a letter to Senator O'Mahoney dated December 16, 1944 made plain that the concession was made by the Commissioners for the sole purpose of obtaining legislation during the 78th Congress. . . .

When the 79th Congress convened Commissioners Johnson and Harrington returned to Washington. As a result of further conferences and because of the press of time a new compromise measure was drafted which likewise departed in some respects from the text of the original Commissioners' proposal. It was transmitted by the Commissioners to the Honorable Pat McCarran, Chairman of the Senate Judiciary Committee of the Senate. . . . Although their names do not appear on the letter of transmittal the National Fraternal Congress and the Accident and Health Underwriters Conference also endorsed the bill in telegrams subsequently sent to Chairman McCarran. This bill was introduced by Senators McCarran and Ferguson and became the original S. 340. It was amended in committee and reported favorably by the committee on January 24, 1945 (see Senate Report No. 20.) The bill was thereafter amended on the floor (see Congressional Record of January 25, 1945.)

Representative Walter introduced a companion measure in the House, known as H.R. 1973. This bill was likewise amended in the House Judiciary Committee and was favorably reported (see House Report No. 68.) On motion of Representative Walter, S. 340, which had been referred by the Senate to the House for concurrence, was amended by striking out all of the bill following the enacting clause and substituting the subject matter of

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H.R. 1973 in lieu thereof (see Congressional Record of February 14, 1945.)

Due to the differences in text the bills were referred to a conference committee composed of Senators McCarran, Ferguson and O'Mahoney and Representatives Summers, Walter and Hancock. The conference committee report is dated February 22, 1945 and will be found as House Report No. 213. The conference committee report was adopted by both Houses without debate in the House and with debate in the Senate (see Congressional Records of February 26 and 27, 1945.)

COMPARISON OF THE VARIOUS BILLS

A comparison of the bill as it was finally enacted with the text of the original Commissioner's proposal of November, 1944, as well as reference to the Congressional debates, establishes clearly that the Commissioners' draft was used as a foundation for the bill. In drafting the bill Congress used almost verbatim those portions of the Commissioners' proposal relating to the doctrine of Congressional silence and the affirmative expression of the Congressional will in so far as they affect state regulations and taxation. That phase of the Commissioners' proposal constituted one of its major aspects and the incorporation of it in the bill as it was finally adopted is most gratifying.

Likewise, the final draft specifically provides, as did the Commissioners' original text, that the National Labor Relations Act and the Fair Labor Standards Act shall apply to the insurance business.

Those portions of the bill covering the territories to which it is applicable and the separability clause are identical with the text of the Commissioners' original proposal.

In the Commissioners' deliberations preceding the drafting of the Commissioners' legislative proposal and throughout all conferences preceding the enactment of the bill the Commissioners were insistent that even though a moratorium on the application of the anti-trust laws were to be granted, boycotting, coercion and intimidation were to be barred forthwith. Provision was made to that effect in the Commissioners' original text and is embodied in the bill as it finally passed.

The Commissioners' original proposals as to a moratorium on the Sherman and Clayton Acts were also embodied in the law as it was finally enacted with a variation as to the effective date.

So much for the respects in which the Commissioners' proposals were generally adopted. We turn now to the respects in which the final product differed from the proposals originally advanced by the Commissioners.

The Commissioners' draft made no reference to the so-called Merchant Marine Act of 1920. Congress provided that the bill should not affect that law.

The Commissioners asked for complete exemption from the Federal Trade Commission Act. The final bill provides that after the expiration of the moratorium the Federal Trade Commission Act shall be applicable to the business of insurance "to the extent that such business is not regulated by state law." The expression in quotation

marks will be the subject of further comment elsewhere in this report.

The Commissioners also asked for outright exemption from the Robinson-Patman Act. Congress has provided specifically that the Robinson-Patman Act shall not apply to the insurance business up to January 1, 1948. We are uncertain as to the applicability of that act to the business of insurance after that date for the following reason. Part of the Robinson-Patman Act (15 U.S.C.A. 13, 13-a) is part of the Clayton Act (15 U.S.C.A. 12-27). Section 2-b of the bill provides that after January 1, 1948 the Clayton Act shall be applicable to the business of insurance "to the extent that such business is not regulated by state law." Section 3-a of the statute provides that until January 1, 1948 the Robinson-Patman Act shall not apply to the business of insurance or to acts in conduct thereof. The specific mention of the Robinson-Patman Act in Section 3-a suggests, or at least it can be so argued, that Congress intended that after January 1, 1948 that act should apply to the insurance business without limitation of any kind. On the contrary, the provision in Section 2-b that the Clayton Act, of which part of the Robinson-Patman Act is a part, shall be applicable to the business of insurance "to the extent that such business is not regulated by state law," suggests that after January 1, 1948 the Robinson-Patman Act, or at least part of it, shall be in the same category as the Federal Trade Commission Act.

This brings us to a consideration of the Sherman and Clayton Acts. In the Commissioners' original text it was provided that there should be a moratorium on the Sherman and Clayton Acts until July 1, 1948. After that date

the Sherman Act was to apply to the insurance business but certain enumerated cooperative efforts, set forth in section 4-b of the Commissioners' proposal, were to be exempted therefrom. The final exemption applied to concerted action in the field of rate making and contemplated state supervision. In the bill finally adopted by Congress the specific activities enumerated in the Commissioners' proposal were omitted and in lieu thereof Congress provided that the Sherman Act, the Clayton Act and the Federal Trade Commission Act should all be applicable to the business of insurance "to the extent that such business is not regulated by state law." In short, a general provision was substituted for the specific language employed by the Commissioners.

The exact meaning of the expression, "to the extent that such business is not regulated by state law," has been the subject of discussion in the Sub-committee. The debate in the United States Senate following the report of the conference committee indicated differences of opinion as to the effect of the language quoted. Some Senators felt that this language gave those states which enacted legislation on the subject the right to modify and even eliminate the applicability of the Sherman and Clayton and Federal Trade Commission Acts to the business of insurance depending upon the extent of the state legislation enacted. Indeed, it was suggested that this language permitted the states to adopt ineffective legislation or, as one Senator put it, "to go through the form of regulation merely in order to put insurance companies within that state on an island of safety from Congressional regulation." It was argued that the states would not abuse the privilege thus conferred upon them and that if by any

chance they did, Congress could immediately pass additional corrective legislation. On the contrary, it was asserted that the legislation did not contemplate ineffective state regulation. This reasoning was based upon the premise that the word "regulated" as used in the quoted language had a very definite meaning and contemplated not mere permissive action uncontrolled by state authorities but affirmative, effective regulation of the type described by the President in his letter of January 2, 1945, to Senator Radcliffe and emphasized in the President's memorandum made public at the time he signed the bill.

The decision of the United States Supreme Court in the *South-Eastern Underwriters* case confronted Congress, the State Legislatures and the Insurance Commissioners with a problem - the task of preserving state regulation and at the same time not emasculating the federal anti-trust laws. The final product does not go as far in some respects as the Commissioners had hoped and goes farther in others, a situation which frequently occurs when compromises must be made. It is apparent, however, that a sincere effort was made to reconcile conflicting views as to the best manner of regulating the insurance business in the public interest.

In so far as this Sub-Committee is concerned our position is clear. We believe in state regulation and this bill recognizes that principle. Under this bill effective state regulation is required if state regulation is to be preserved. The bill presents a challenge to the states. We believe the states can meet that challenge. We restate the fundamental principle to which we have consistently adhered, namely, that the states are under an obligation to provide effective state regulation. Those states whose

statutes are deficient in that respect should immediately address themselves to the task of securing appropriate legislation designed to meet this new development.

Respectfully submitted,

Charles F. J. Harrington, Chairman
 Newell R. Johnson
 James M. McCormack
 Edward L. Scheufler
 Robert E. Dineen
 J. Edwin Larson

UNFAIR TRADE PRACTICES ACT

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Prefatory Note: By adopting amendments to this model act in June 1990, the NAIC separated provisions dealing with unfair claims settlement into a newly adopted Unfair Claims Settlement Practices Model Act, to make clearer distinction between general unfair trade practices and more specific unfair claim settlement issues and to focus on market conduct practices and market conduct regulation. By doing so, the NAIC is not recommending that states repeal existing acts, but states may modify them for the purpose of capturing the substantive changes. However, for those states wishing to completely rewrite their comprehensive approach to unfair claims practices, this separation of unfair claims from unfair trade practices is recommended.

Section 1. Purpose

The purpose of this Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state that constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. Nothing herein shall be construed to create or imply a private cause of action for a violation of this Act.

Section 2. Definitions

When used in this Act:

- A. "Commissioner" means the commissioner of insurance of this state.

Drafting Note: Insert the appropriate term for the chief insurance regulatory official wherever the term "commissioner" appears.

- B. "Insured" means the party named on a policy or certificate as the individual with legal rights to the benefits provided by such policy.
- C. "Insurer" means any person, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers, adjusters and third-party administrators. Insurer shall also mean medical service plans, hospital service plans, health maintenance organizations, prepaid limited health care service plans, dental, optometric and other similar

health service plans as defined in Sections [insert applicable section]. For purposes of this Act, these foregoing entities shall be deemed to be engaged in the business of insurance.

Drafting Note: Each state may wish to consider the advisability of defining "insurance" for purposes of this Act if its present insurance code is not satisfactory in this regard. In some cases a cross reference will be sufficient.

- D. "Person" means any natural or artificial entity, including but not limited to, individuals, partnerships, associations, trusts or corporations.
- E. "Policy" or "certificate" means any contract of insurance, indemnity, medical, health or hospital service, suretyship, or annuity issued, proposed for issuance, or intended for issuance by any insurer.
- F. "Producer" means a person who solicits, negotiates, effects, procures, delivers, renews, continues or binds policies of insurance for risks residing, located or to be performed in this state.

Section 3. Unfair Trade Practices Prohibited

It is an unfair trade practice for any insurer to commit any practice defined in Section 4 of this Act if:

- A. It is committed flagrantly and in conscious disregard of this Act or of any rules promulgated hereunder; or
- B. It has been committed with such frequency to indicate a general business practice to engage in that type of conduct.

Section 4. Unfair Trade Practices Defined

Any of the following practices, if committed in violation of Section 3, are hereby defined as unfair trade practices in the business of insurance:

A. **Misrepresentations and False Advertising of Insurance Policies.** Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement, sales presentation, omission or comparison that:

- (1) Misrepresents the benefits, advantages, conditions or terms of any policy; or
- (2) Misrepresents the dividends or share of the surplus to be received on any policy; or
- (3) Makes a false or misleading statement as to the dividends or share of surplus previously paid on any policy; or
- (4) Is misleading or is a misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates; or
- (5) Uses any name or title of any policy or class of policies misrepresenting the true nature thereof; or
- (6) Is a misrepresentation, including any intentional misquote of premium rate, for the purpose of inducing or tending to induce the purchase, lapse, forfeiture, exchange, conversion or surrender of any policy; or
- (7) Is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against any policy; or

(8) Misrepresents any policy as being shares of stock.

B. **False Information and Advertising Generally.** Making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any insurer in the conduct of its insurance business, which is untrue, deceptive or misleading.

C. **Defamation.** Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of any insurer, and which is calculated to injure such insurer.

D. **Boycott, Coercion and Intimidation.** Entering into any agreement to commit, or by any concerted action committing any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

E. **False Statements and Entries.**

- (1) Knowingly filing with any supervisory or other public official, or knowingly making,

publishing, disseminating, circulating or delivering to any person, or placing before the public, or knowingly causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement of fact as to the financial condition of an insurer.

- (2) Knowingly making any false entry of a material fact in any book, report or statement of any insurer or knowingly omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer, or knowingly making any false material statement to any insurance department official.

F. Stock Operations and Advisory Board Contracts. Issuing or delivering or permitting agents, officers or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to purchase insurance.

G. Unfair Discrimination.

- (1) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any life insurance policy or annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such policy.

- (2) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any accident or health insurance policy or in the benefits payable thereunder, or in any of the terms or conditions of such policy, or in any other manner.

Drafting Note: In the event that unfair discrimination in connection with accident and health coverage is treated in other statutes, this paragraph should be omitted.

- (3) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazard by refusing to insure, refusing to renew, cancelling or limiting the amount of insurance coverage on a property or casualty risk solely because of the geographic location of the risk, unless such action is the result of the application of sound underwriting and actuarial principles related to actual or reasonably anticipated loss experience.
- (4) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to insure, refusing to renew, cancelling or limiting the amount of insurance coverage on the residential property risk, or the personal property contained therein, solely because of the age of the residential property.
- (5) Refusing to insure, refusing to continue to insure, or limiting the amount of coverage

available to an individual because of the sex, marital status, race, religion or national origin of the individual; however, nothing in this subsection shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependent benefits. Nothing in this section shall prohibit or limit the operation of fraternal benefit societies.

- (6) To terminate, or to modify coverage or to refuse to issue or refuse to renew any property or casualty policy solely because the applicant or insured or any employee of either is mentally or physically impaired; provided that this subsection shall not apply to accident and health insurance sold by a casualty insurer and, provided further, that this subsection shall not be interpreted to modify any other provision of law relating to the termination, modification, issuance or renewal of any insurance policy or contract.
- (7) Refusing to insure solely because another insurer has refused to write a policy, or has cancelled or has refused to renew an existing policy in which that person was the named insured. Nothing herein contained shall prevent the termination of an excess insurance policy on account of the failure of the insured to maintain any required underlying insurance.
- (8) Violation of the state's rescission laws at [insert reference to appropriate code section].

Drafting Note: A state may wish to include this section if it has existing state laws covering rescission and to insert a reference to a particular code section.

H. Rebates.

- (1) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any life insurance policy or annuity, or accident and health insurance or other insurance, or agreement as to such contract other than as plainly expressed in the policy issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such policy, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the policy; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such policy or annuity or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the policy.
- (2) Nothing in Subsection G, or Paragraph (1) of Subsection H shall be construed as including within the definition of discrimination or rebates any of the following practices:

- (a) In the case of life insurance policies or annuities, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;
- (b) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount that fairly represents the saving in collection expenses;
- (c) Readjusting the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

Drafting Note: Each state may wish to examine its rating laws to assure that they contain sufficient provision against rebating. If they do not, this section might be expanded to cover all lines of insurance.

- I. **Prohibited Group Enrollments.** No insurer shall offer more than one group policy of insurance through any person unless such person is licensed, at a minimum, as a limited insurance representative. However, this prohibition shall

not apply to employer/employee relationships, nor to any such enrollments.

- J. **Failure to maintain marketing and performance records.** Failure of an insurer to maintain its books, records, documents and other business records in such an order that data regarding complaints, claims, rating, underwriting and marketing are accessible and retrievable for examination by the insurance commissioner. Data for at least the current calendar year and the two (2) preceding years shall be maintained.
- K. **Failure to Maintain Complaint Handling Procedures.** Failure of any insurer to maintain a complete record of all the complaints it received since the date of its last examination under Section [insert applicable section]. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of each complaint, and the time it took to process each complaint. For purposes of this subsection, "complaint" shall mean any written communication primarily expressing a grievance.
- L. **Misrepresentation in Insurance Applications.** Making false or fraudulent statements or representations on or relative to an application for a policy, for the purpose of obtaining a fee, commission, money or other benefit from any provider or individual person.
- M. **Unfair Financial Planning Practices.** An insurance producer:
 - (1) Holding himself or herself out, directly or indirectly, to the public as a "financial planner," "investment adviser," "consultant,"

"financial counselor," or any other specialist engaged in the business of giving financial planning or advice relating to investments, insurance, real estate, tax matters or trust and estate matters when such person is in fact engaged only in the sale of policies.

Drafting Note: This provision is not intended to preclude persons who hold some form of formal recognized financial planning or consultant designation from using this designation when they are only selling insurance. This does not permit persons to charge an additional fee for services that are customarily associated with the solicitation, negotiation or servicing of policies.

- (2) (a) Engaging in the business of financial planning without disclosing to the client prior to the execution of the agreement provided for in Paragraph 3, or solicitation of the sale of a product or service that
 - (i) He or she is also an insurance salesperson, and
 - (ii) That a commission for the sale of an insurance product will be received in addition to a fee for financial planning, if such is the case.
- (b) The disclosure requirement under this subsection may be met by including it in any disclosure required by federal or state securities law.
- (3) (a) Charging fees other than commissions for financial planning by insurance producer, unless such fees are based

upon a written agreement, signed by the party to be charged in advance of the performance of the services under the agreement. A copy of the agreement must be provided to the party to be charged at the time the agreement is signed by the party.

- (i) The services for which the fee is to be charged must be specifically stated in the agreement.
- (ii) The amount of the fee to be charged or how it will be determined or calculated must be specifically stated in the agreement.
- (iii) The agreement must state that the client is under no obligation to purchase any insurance product through the insurance agent, broker or consultant.

Drafting Note: This subsection is intended to apply only to persons engaged in personal financial planning.

- (b) The insurance producer shall retain a copy of the agreement for not less than three (3) years after completion of services, and a copy shall be available to the commissioner upon request.
- N. Failure to file or to certify information regarding the endorsement or sale of long-term care insurance. Failure of any insurer to:
- (1) File with the insurance department the following material:
 - (a) The policy and certificate;

- (b) A corresponding outline of coverage; and
 - (c) All advertisements requested by the insurance department; or
- (2) Certify annually that the association has complied with the responsibilities for disclosure, advertising, compensation arrangements, or other information required by the commissioner, as set forth by regulation.

O. Failure to Provide Claims History

- (1) **Loss Information – Property and Casualty.** Failure of a company issuing property and casualty insurance to provide the following loss information for the three (3) previous policy years to the first named insured within thirty (30) days of receipt of the first named insured's written request:
- (a) On all claims, date and description of occurrence, and total amount of payments; and
 - (b) For any occurrence not included in Subparagraph (a) of this Paragraph (1), the date and description of occurrence.
- (2) Should the first named insured be requested by a prospective insurer to provide detailed loss information in addition to that required under Paragraph (1), the first named insured may mail or deliver a written request to the insurer for the additional information. No prospective insurer shall request more detailed loss information than reasonably required to underwrite the same line or class of insurance.

The insurer shall provide information under this subparagraph to the first named insured as soon as possible, but in no event later than twenty (20) days of receipt of the written request. Notwithstanding any other provision of this section, no insurer shall be required to provide loss reserve information, and no prospective insurer may refuse to insure an applicant solely because the prospective insurer is unable to obtain loss reserve information.

- (3) The commissioner may promulgate regulations to exclude the providing of the loss information as outlined in Paragraph (1) for any line or class of insurance where it can be shown that the information is not needed for that line or class of insurance, or where the provision of loss information otherwise is required by law.

Drafting Note: Loss information on workers' compensation is an example in some states of loss information otherwise required by law.

- (4) Information provided under Paragraph (2) shall not be subject to discovery by any party other than the insured, the insurer, and the prospective insurer.

Drafting Note: This provision may not be required in states that have a privacy act which governs consumer access to this information. Those states considering applying this requirement to life, accident and health lines of insurance should first review their state privacy act related to issues of confidentiality of individual insured information.

- P. Violating any one of Sections [insert applicable sections].

Drafting Note: Insert section numbers of any other sections of the state's insurance laws deemed desirable or necessary to include as an unfair trade practice, such as cancellation and nonrenewal laws.

Section 5. Favored Agent or Insurer; Coercion of Debtors

- A. No person may require as a condition precedent to the lending of money or extension of credit, or any renewal thereof, that the person to whom such money or credit is extended or whose obligation a creditor is to acquire or finance, negotiate any policy or renewal thereof through a particular insurer or group of insurers or agent or broker or group of agents or brokers.
- B. No person who lends money or extends credit may:
- (1) Solicit insurance for the protection of real property, after a person indicates interest in securing a first mortgage credit extension, until such person has received a commitment in writing from the lender as to a loan or credit extension;
 - (2) Unreasonably reject a policy furnished by the borrower for the protection of the property securing the credit or lien. A rejection shall not be deemed unreasonable if it is based on reasonable standards, uniformly applied, relating to the extent of coverage required and the financial soundness and the services of an insurer. Such standards

shall not discriminate against any particular type of insurer, nor shall such standards call for rejection of a policy because it contains coverage in addition to that required in the credit transaction;

- (3) Require that any borrower, mortgagor, purchaser, insurer, broker or agent pay a separate charge, in connection with the handling of any policy required as security for a loan on real estate, or pay a separate charge to substitute the policy of one insurer for that of another. This paragraph does not include the interest that may be charged on premium loans or premium advancements in accordance with the terms of the loan or credit document;
 - (4) Use or disclose, without the prior written consent of the borrower, mortgagor or purchaser taken at a time other than the making of the loan or extension of credit, information relative to a policy which is required by the credit transaction, for the purpose of replacing such insurance;
 - (5) Require any procedures or conditions of duly licensed agents, brokers or insurers not customarily required of those agents, brokers or insurers affiliated or in any way connected with the person who lends money or extends credit.
- C. Every person who lends money or extends credit and who solicits insurance on real and personal property subject to Subsection B of this section shall explain to the borrower in writing that the insurance related to such credit extension may be purchased from an insurer or agent of the borrower's choice, subject only to the

lender's right to reject a given insurer or agent as provided in Subsection B(2). Compliance with disclosures as to insurance required by truth-in-lending laws or comparable state laws shall be compliance with this subsection.

This requirement for a commitment shall not apply in cases where the premium for the required insurance is to be financed as part of the loan or extension of credit involving personal property transactions.

- D. The commissioner shall have the power to examine and investigate those insurance related activities of any person or insurer that the commissioner believes may be in violation of this section. Any affected person may submit to the commissioner a complaint or material pertinent to the enforcement of this section.
- E. Nothing herein shall prevent a person who lends money or extends credit from placing insurance on real or personal property in the event the mortgagor, borrower or purchaser has failed to provide required insurance in accordance with the terms of the loan or credit document.
- F. Nothing contained in this section shall apply to credit life or credit accident and health insurance.

Section 6. Power of Commissioner

The commissioner shall have power to examine and investigate the affairs of every insurer in this state in order to determine whether such insurer has been or is engaged in any unfair trade practice prohibited by this Act.

Section 7. Hearings, Witnesses, Appearances, Production of Books, and Service of Process

- A. Whenever the commissioner shall have reason to believe that any insurer has been engaged or is engaging in this state in any unfair trade practice whether or not defined in this Act, and that a proceeding by the commissioner in respect thereto would be in the interest of the public, the commissioner shall issue and serve upon such insurer a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than [insert number] days after the date of the service thereof.
- B. At the time and place fixed for such hearing, the insurer shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring the insurer to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at the hearing by counsel or in person.
- C. Nothing contained in this Act shall require the observance at any such hearing of formal rules of pleading or evidence.
- D. The commissioner, upon such hearing, may administer oaths, examine and cross examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence or other documents the commissioner deems relevant to the inquiry. The commissioner, upon such hearing, may, and upon the request of any party shall, cause to be

made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the [insert title] Court of [insert county] County or the county where such person resides, on application of the commissioner, may issue an order requiring such person to comply with the subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

- E. Statements of charges, notices, orders and other processes of the commissioner under this Act may be served by anyone duly authorized by the commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order or other process at the person's residence or principal office or place of business. The verified return by the person so serving the statement, notice, order, or other process, setting forth the manner of service, shall be proof of the same, and the return postcard receipt for the statement, notice, order or other process, registered and mailed as aforesaid, shall be proof of the service of the same.

Section 8. Cease and Desist and Penalty Orders

If, after hearing, the commissioner finds that an insurer has engaged in an unfair trade practice, the commissioner shall reduce the findings to writing and shall issue and cause to be served upon the insurer charged with the violation, a copy of the findings in an order requiring the insurer to cease and desist from engaging in the act or practice and the commissioner may, at the commissioner's discretion order:

- A. Payment of a monetary penalty of not more than \$1,000 for each violation, but not to exceed an aggregate penalty of \$100,000, unless the violation was committed flagrantly in a conscious disregard of this Act, in which case the penalty shall not be more than \$25,000 for each violation not to exceed an aggregate penalty of \$250,000; and/or
- B. Suspension or revocation of the insurer's license if the insurer knew or reasonably should have known that it was in violation of this Act.

Section 9. Judicial Review of Orders

- A. Any person subject to an order of the commissioner under Section 8 or Section 11 may obtain a review of such order by filing in the [insert title] Court of [insert county] County, within [insert number] days from the date of the service of such order, a written petition praying that the order of the commissioner be set aside. A copy of such petition shall be forthwith served upon the commissioner, and thereupon the commissioner forthwith shall certify and file in such court a transcript of the entire record in the

proceeding, including all the evidence taken and the report and order of the commissioner. Upon filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of the order of the commissioner, and shall have power to make and enter upon the pleadings, evidence and proceedings set forth in the transcript a decree modifying, affirming or reversing the order of the commissioner, in whole or in part. The findings of the commissioner as to the facts, if supported by [insert type] evidence, shall be conclusive.

Drafting Note: Insert appropriate language to accommodate to local procedure the effect given the commissioner's determination.

- B. To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner, the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper. The commissioner may modify the findings of fact, or make new findings by reason of the additional evidence so taken, and shall file such modified or new findings that are

supported by [insert type] evidence with a recommendation if any, for the modification or setting aside of the original order, with the return of such additional evidence.

Drafting Note: Insert appropriate language to accommodate to local procedure the effect given the commissioner's determination. In a state where final judgment, order or decree would not be subject to review by an appellate court provision therefor should be inserted here.

- C. An order issued by the commissioner under Section 8 shall become final:
- (1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the commissioner may thereafter modify or set aside the order to the extent provided in Section 8B; or
 - (2) Upon the final decision of the court if the court directs that the order of the commissioner be affirmed or the petition for review dismissed.
- D. No order of the commissioner under this Act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.

Section 10. Judicial Review by Intervenor

If after any hearing under Section 7 or Section 11, the report of the commissioner does not charge a violation of this Act, then any intervenor in the proceedings may

within [insert number] days after the service of such report, cause a petition [notice of appeal] [petition for writ of certiorari] to be filed in the [insert title] Court of [insert county] County for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the commissioner, constitutes a violation of this Act, and containing penalties pursuant to Section 8.

Drafting Note: The type of procedure should conform to state procedure. See also note to Section 9 concerning review by appellate courts.

Section 11. Penalty for Violation of Cease and Desist Orders

Any insurer which violates a cease and desist order of the commissioner and while such order is in effect, may after notice and hearing and upon order of the commissioner, be subject at the discretion of the commissioner to:

- A. A monetary penalty of not more than \$25,000 for each and every act or violation not to exceed an aggregate of \$250,000 pursuant to any such hearing; and/or
- B. Suspension or revocation of the insurer's license.

Section 12. Regulations

The commissioner may, after notice and hearing, promulgate reasonable rules, regulations and orders as are necessary or proper to carry out and effectuate the provisions of this Act. Such regulations shall be subject to review in accordance with Section [insert applicable section].

Drafting Note: Insert section number providing for review of administrative orders.

Section 13. Provisions of Act Additional to Existing Law

The powers vested in the commissioner by this Act shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

Section 14. Immunity From Prosecution

If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required may tend to incriminate or subject the person to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, the person shall nonetheless comply with such direction, but shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which the

person may testify or produce evidence thereto, and no testimony so given or evidence produced shall be received against the person upon any criminal action, investigation or proceeding; provided, however, that no such person so testifying shall be exempt from prosecution or punishment for any perjury committed while so testifying and the testimony or evidence so given or produced shall be admissible against the person upon any criminal action, investigation or proceeding concerning such perjury, nor shall the person be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the Insurance Law of this state. Any such person may execute, acknowledge and file in the office of the commissioner a statement expressly waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such person shall not be entitled to any immunity or privilege on account of any testimony the person may so give or evidence so produced.

Section 15. Separability Provision

If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to person or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Legislative History (all references are to the Proceedings of the NAIC).

- 1947 Proc. 383, 392-400, 413 (adopted).
 - 1960 Proc. II 485-487, 509-515, 516 (reprinted).
 - 1972 Proc. I 15, 16, 443-444, 491, 493-501 (amended and reprinted).
 - 1977 Proc. I 26, 28, 211, 226-227 (amended).
 - 1979 Proc. II 31, 34, 38, 39-40, 525 (amended).
 - 1985 Proc. I 19, 39, 85-86 (amended).
 - 1989 Proc. II 13, 21, 129-130, 132, 133-140 (amended and reprinted).
 - 1990 Proc. I 6, 25, 122, 146 (changed name of model).
 - 1990 Proc. II 7, 13-14, 160, 169-177 (amended and reprinted).
 - 1991 Proc. I 9, 16, 192-193, 196-203 (amended and reprinted).
 - 1993 Proc. I 8, 136, 242, 246-254 (amended and reprinted).
 - 1993 Proc. 1st Quarter 3, 34, 267, 274, 276 (amended).
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UNFAIR TRADE PRACTICES ACT

The date in parentheses is the effective date of the legislation or regulation, with latest amendments. See KEY on last page.

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Alabama		
Alaska	ALASKA STAT. §§ 21.36.010 to 21.36.350 (1976/1992).	ALA. CODE §§ 27-12-1 to 27-12-24 (1971).
Arizona	ARIZ. REV. STAT. ANN. §§ 20-441 to 20-461 (1954/1982).	ALASKA STAT. 21.36.145 (1992) (Financial planners).
Arkansas	ARK. STAT. ANN. §§ 23-66-201 to 23-66-316 (1959/1995).	
California	CAL. INS. CODE §§ 780 to 790.10 (1959/1989).	See also CAL. INS. CODE § 750.1 (1987) (Rebating).
Colorado	COLO. REV. STAT. §§ 10-3-1101 to 10-3-1113 (1963/1987).	
Connecticut	CONN. GEN. STAT. § 38a-815 38a-819 (1955/1995)[1]	

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Delaware	DEL. CODE ANN. tit. 18 §§ 2301 to 2314 (1953/1995)[1]	
D.C.	NO ACTION TO DATE	
Florida	FLA. STAT §§ 626.951 to 626.9641 (1982/1995)[1]	See also FLA. STAT. § 626.572 (1990) (Rebating).
Georgia	GA. CODE ANN. §§ 33-6-1 to 33-6-14 (1972/1992).	
Guam	NO ACTION TO DATE	
Hawaii	HAWAII REV. STAT. §§ 431:13-101 to 431:13-204 (1988/1989).	
Idaho	IDAHO CODE §§ 41-1301 to 41-1331 (1961/1987).	See also Bulletin 88-2 on rebating.
Illinois		215 ILL. COMP. STAT. 5/421 to 5/434 (1959/1984).
Indiana	IND. CODE §§ 27-4-1-1 to 27-4-1-18 (1947/1994).	
Iowa	IOWA CODE §§ 507B.1 to 507B.14 (1955/1982).	

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Kansas	KAN. STAT. ANN. §§ 40-2401 to 40-2421 (1955/1992).
Kentucky	KY. REV. STAT. §§ 304.12-010 to 304.12-230 (1970/1988).
Louisiana	LA. REV. STAT. ANN. §§ 22:1211 to 22:1219 (1966/1993).
Maine	ME. REV. STAT. ANN. tit. 24-A §§ 2151 to 2182 (1970/1987) (Some extra provisions).
Maryland	MD. ANN. CODE art. 48A §§ 212 to 234 (1947/1990).
Massachusetts	MASS. GEN. LAWS ch. 176D §§ 1 to 14 (1972).
Michigan	MICH. COMP. LAWS §§ 500.2001 to 2093 (1957/1992) (Some extra provisions).
Minnesota	MINN. STAT. §§ 72A.17 to 72A.32 (1967/1983).

Mississippi	MISS. CODE ANN. §§ 83-5-29 to 83-5-51 (1956).	<i>See also</i> MO. ADMIN. CODE tit. 20 § 100-2.100 (1990) (Financial planners).
Missouri	MO. REV. STAT. §§ 375.930 to 375.948 (1978/1991).	
Montana	MONT. CODE ANN. §§ 33-18-101 to 33-18-1005 (1959/1987).	
Nebraska	NEB. REV. STAT. §§ 44-1522 to 44-1535 (1973/1994).	
Nevada	NEV. REV. STAT. §§ 686A.010 to 686A.320 (1971/1987).	
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Wyoming WYO. STAT. §§ 26-13-101 to
26-13-124 (1967/1986).

KEY

[1] Includes specific reference to unfair discrimination against victims of domestic violence.

DEC 7 1995

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
v. *Petitioner,*

**BILL NELSON, INSURANCE COMMISSIONER OF THE STATE
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FLORIDA ASSOCIATION OF LIFE UNDERWRITERS, PRO-
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FLORIDA ASSOCIATION OF INSURANCE AGENTS,**
Respondents.

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for the Eleventh Circuit

**BRIEF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES,
NATIONAL GOVERNORS' ASSOCIATION,
INTERNATIONAL CITY/COUNTY
MANAGEMENT ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL LEAGUE OF CITIES,
U.S. CONFERENCE OF MAYORS,
AND COUNCIL OF STATE GOVERNMENTS
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

Of Counsel

ARTHUR E. WILMARTH, JR.
Associate Professor of Law
George Washington
University Law School
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-6386

RICHARD RUDA *

Chief Counsel

LEE FENNELL

STATE AND LOCAL LEGAL
CENTER

444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850

** Counsel of Record for the
Amici Curiae*

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QUESTION PRESENTED

Whether 12 U.S.C. § 92, which provides that national banks in places with no more than 5,000 inhabitants may act as insurance agents, preempts a Florida law that prohibits most such banks from engaging in most insurance agency activities.

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IN THE
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OCTOBER TERM, 1995

No. 94-1837

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BRIEF OF THE
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U.S. CONFERENCE OF MAYORS,
AND COUNCIL OF STATE GOVERNMENTS
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect

state and local governments. Insurance regulation is an area of historic state control and expertise. "When the States speak in the field of 'insurance' they speak with the authority of a long tradition." *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 68 (1959). Recognizing this tradition, Congress sought in the McCarran-Ferguson Act to ensure that States retain plenary authority over regulation of the "business of insurance." 15 U.S.C. § 1012.

Florida, like at least fourteen other States, *see* Pet. 6 n.1, has exercised its reserved regulatory power by restricting a type of insurance agency activity deemed by its legislature to be particularly susceptible to abuses—namely, insurance sales by agents controlled by bank holding companies. Such a regulatory choice plainly falls within the broad authority over the "business of insurance" reserved to States by the McCarran-Ferguson Act. *See generally* Ruth Gastel, *Financial Services*, Insurance Information Institute Reports (Aug. 1995) (discussing variations in state regulation of insurance sales by banks). Petitioner's reading of that Act, however, would permit such insurance regulation by the States to be overridden by a federal banking provision, 12 U.S.C. § 92, which permits national banks located in towns of less than 5,000 to sell insurance.

Such a result could have a significantly adverse impact on state insurance regulation. The Comptroller has taken the position, affirmed by two courts of appeals, that national banks may sell insurance from branch offices located in small towns to customers residing anywhere, without geographic limitation. *See NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995); *Independent Ins. Agents v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993); Comptroller Interp. Letter No. 366 [1985-87 Transfer Binder], Fed. Banking L. Rep. (CCH) Par. 85,536 (Aug. 18, 1986). Accordingly, if petitioner's claim is upheld, the insurance agency authority exercised by national banks under Section 92 would undermine the regulatory scheme for insurance agents in Florida and other States.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.¹

SUMMARY OF ARGUMENT

1. The McCarran-Ferguson Act, 15 U.S.C. § 1012, was designed "broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946), *quoted in United States Dep't of Treas. v. Fabe*, 113 S.Ct. 2202, 2207 (1993). In passing the Act, Congress sought to restore and safeguard the States' historical primacy in the regulation of the business of insurance and to preserve their authority to protect policyholders from abuses. Towards that end, the Act "transformed the legal landscape by overturning the normal rules of pre-emption," *Fabe*, 113 S.Ct. at 2211, thereby preserving from preemption any law "enacted by any State for the purpose of regulating the business of insurance" unless it conflicts with a federal law that "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Accordingly, the analysis in any insurance preemption case "start[s] with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements." *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 68 (1959).

2. Florida's law prohibiting most national banks from selling insurance was clearly enacted "for the purpose of regulating the business of insurance." The Court has emphasized that the policyholder relationship lies at the core of the "business of insurance," and that laws designed to protect policyholders in the sales and marketing of insur-

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

ance fall squarely within the scope of that term. *See, e.g., SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). In both purpose and effect, Florida's law protects policyholders by prohibiting sales under circumstances that, in the judgment of the legislature, carry an unacceptably high risk of coercion and abuse. *See Production Credit Ass'ns of Florida v. Department of Ins.*, 356 So.2d 31, 32 (Fla. Dist. Ct. App. 1978). It therefore plainly constitutes a law enacted "for the purpose of regulating the business of insurance" and is presumptively entitled to preservation under the McCarran-Ferguson Act's reverse preemption provision.

3. Section 92 does not "specifically relate to the business of insurance," and therefore does not preempt Florida's statute. As the Court has explained, a federal statute satisfies this exacting preemption standard only if it contains a "clear statement" of preemptive intent, *see Fabe*, 113 S.Ct. at 2211, or "expressly provide[s]" for such preemption. *Prudential*, 328 U.S. at 429. Section 92, a federal banking law passed at a time when the business of insurance was believed by Congress to be beyond the reach of its power, *see* Pet. App. 15a, contains no hint that it was intended to abrogate state insurance law. On the contrary, it is clear from the text, purpose, and history of both Section 92 and the McCarran-Ferguson Act that Section 92 does not have preemptive force.

As the structure and purpose of the McCarran-Ferguson Act make clear, the category of federal laws "specifically relat[ing] to the business of insurance" represents a narrow exception carved out of the broad authority preserved to the States to enact laws "for the purpose of regulating the business of insurance." Petitioner's assertion that a federal law permitting certain conduct automatically qualifies as one "specifically relat[ing] to the business of insurance," if a state law prohibiting the same conduct qualifies as one enacted "for the purpose of regulating the business of insurance," ignores this structure and purpose. Moreover, such a reading would render the

McCarran-Ferguson Act's unique reverse preemption provision superfluous, since that provision only comes into play when there is a federal law which permits, prohibits, or requires some conduct that the State has also sought to regulate as part of "the business of insurance." Because Section 92 does not "specifically relate" to the core concerns of the "business of insurance" it cannot satisfy the heavy burden it must meet to preempt Florida's statute.

ARGUMENT

THE McCARRAN-FERGUSON ACT PRESERVES FLORIDA'S LAW FROM PREEMPTION BY SECTION 92

A. The McCarran-Ferguson Act Establishes The Primacy Of State Regulation Of The Business Of Insurance

The McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which for the first time called into question the States' longstanding authority to regulate the business of insurance. In passing the Act, Congress sought to restore and safeguard the States' historical regulatory power over insurance, including the States' critical role in regulating both insurance companies and their agents in order to protect policyholders from abuses.³ As Justice Jackson explained in dissent in *South-Eastern Underwriters*,

For one hundred fifty years Congress never has undertaken to regulate the business of insurance. Therefore to give the public any protection against abuses to which that business is peculiarly susceptible the states have had to regulate it. Since 1851 the several states, spurred by necessity and with acquiescence of every branch of the Federal Government,

³ *See generally* Peter R. Nehekis, Jr., *Paul v. Virginia: The Need For Re-Examination*, 27 Geo. L.J. 519, 520-21 (1939) (discussing abuses accompanying growth of the insurance industry) (cited in *South-Eastern Underwriters*, 322 U.S. at 544 n.20).

have been building up systems of regulation to discharge this duty toward their inhabitants.

322 U.S. at 584 (Jackson, J., dissenting).

The legislative history of the McCarran-Ferguson Act emphasizes this background: "From its beginning the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several States." S. Rep. No. 20, 79th Cong., 1st Sess. 1 (1945); see also H.R. Rep. No. 143, 79th Cong., 1st Sess. 1, 2 (1945) (same). Thus, as this Court stated in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), the McCarran-Ferguson Act "broadly . . . [gave] support to the existing and future state systems for regulating and taxing the business of insurance . . . by removing obstructions which might be thought to flow from [Congress'] power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation." *Id.* at 429-30.³

In *United States Dep't of Treas. v. Fabe*, 113 S.Ct. 2202 (1993), the Court reaffirmed the sweeping effect of the McCarran-Ferguson Act. As the Court explained, the Act not only restored state authority to regulate insurance after *South-Eastern Underwriters*, it also

transformed the legal landscape by overturning the normal rules of pre-emption. Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) reverses this by imposing what is,

³ See also *United States Dep't of Treas. v. Fabe*, 113 S.Ct. 2202, 2210 (1993) ("As was stated in [*Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979)], the first clause of § 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance."); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1099 n.5 (1983) (Powell, J., dissenting in part and concurring in part) ("Congress thus enacted broad legislation 'so that the several States may know that the Congress desires to protect the continued regulation . . . of the business of insurance by the several States.'") (quoting H.R. Rep. No. 143).

in effect, a clear-statement rule, a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.

Id. at 2211 (citing 15 U.S.C. § 1012(b)).

Because of the unique "reverse preemption" operation of the McCarran-Ferguson Act, which Congress deemed necessary to preserve the States' long-established regulatory powers over insurance, state regulation of the business of insurance is presumptively valid as against assertedly conflicting federal laws. Hence, the Court, in insurance preemption cases,

start[s] with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of "insurance" they speak with the authority of a long tradition.

SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 68 (1959).

Accordingly, any law "enacted by any State for the purpose of regulating the business of insurance" is preserved from preemption *unless* it conflicts with a federal law that "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Florida's law clearly satisfies both parts of this statutory formula and is thereby preserved from preemption. It is a law enacted for the purpose of regulating the business of insurance, and the assertedly conflicting federal law, 12 U.S.C. § 92, does not specifically relate to the business of insurance.⁴ Petitioner's

⁴ Amici agree with respondents that, even in the absence of McCarran-Ferguson's "reverse preemption" provisions, Section 92's merely permissive provisions do not directly conflict with Florida's prohibition on bank insurance sales so as to require preemption. See Resp. Bill Nelson Br. Issue III; Resp. Ins. Agents Br. Pt. I; cf. *Exxon Corp. v. Maryland*, 437 U.S. 117, 131 (1978) (declining to

argument to the contrary is flatly inconsistent with the structure and purpose of the McCarran-Ferguson Act.

B. Florida's Law Was Enacted "For The Purpose Of Regulating The Business Of Insurance"

Fabe contains this Court's most recent interpretation of the phrase "for the purpose of regulating the business of insurance." In that case, the Court explained that:

The broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention, or aim" of adjusting, managing, or controlling the business of insurance. This category necessarily encompasses more than just the "business of insurance."

113 S.Ct. at 2210 (citation omitted). In order to assess whether Florida's law falls within that "broad category of laws," it is first necessary to consider the meaning of the narrower term "business of insurance."

In *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), the Court defined the term "business of insurance" by identifying the core regulatory areas that Congress sought to reserve to the States through its use of that term:

The selling and advertising of policies and the licensing of companies and their agents are also within the scope of [McCarran-Ferguson]. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* held was not "commerce."

find preemption warranted where "the alleged 'conflict' [between a Maryland law and the Robinson-Patman Act] is in the possibility that the Maryland statute may require uniformity in some situations in which the Robinson-Patman Act would permit localized discrimination". For purposes of argument, however, *amici* here assume that Section 92, which permits national banks located in towns of less than 5,000 to sell insurance, conflicts with Florida's law prohibiting most insurance sales by most such banks.

The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." . . . [W]hatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, *directly or indirectly* are laws regulating the "business of insurance."

Id. at 460 (citations omitted) (emphasis added).

This key language, recently reiterated by the Court in *Fabe*, 113 S.Ct. at 2208, plainly establishes that the Florida law is one enacted "for the purpose of regulating the business of insurance." In both purpose and effect, Florida's law protects insurance policyholders by restricting the conditions under which contracts of insurance may be sold. It thereby regulates the relationship between policyholders and insurance companies. *See Production Credit Ass'ns v. Department of Ins.*, 356 So.2d 31, 32 (Fla. Dist. Ct. App. 1978) ("The Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest.").

⁵ See also *Glendale Fed. S & L Ass'n v. Florida Dep't of Ins.*, 587 So.2d 534, 536-37 & n.1 (Fla. Dist. Ct. App. 1991) (*per curiam*), *rev. denied*, 599 So.2d 656 (Fla. 1992); Pet. App. 11a-12a (opinion of the court of appeals).

The United States urges the Court to undertake an independent analysis of the "actual purpose" of Florida's law. *See Br. Am. Cur. United States* at 16. Such an inquiry has not been deemed necessary or appropriate by the Court unless the purpose articulated by the legislature and affirmed by state courts "could not have been a goal of the legislation." *See, e.g., Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 463 n. 7 (1981) (citation omitted); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469-70 (1981) (plurality opinion). Indeed, the Court "has long recognized that '[i]nquiries into congressional motives or purposes

Moreover, Florida's concern with protecting policyholders from abuses by insurance agents clearly falls within "the business of insurance" as defined by this Court's opinions interpreting that language within the narrower confines of the McCarran-Ferguson Act's antitrust exemption.⁶ *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205 (1979), and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), establish "three criteria relevant in determining whether a particular practice is part of the 'business of insurance'":

[F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Pireno, 458 U.S. at 129.

Florida's law clearly satisfies these criteria. With respect to the first element, "[t]he transfer of risk from insured to insurer is effected by means of the contract between the parties—the insurance policy—and that transfer is complete at the time that the contract is

are a hazardous matter,' and the search for the 'actual' or 'primary' purpose of a statute is likely to be elusive." *Id.* (citations omitted). Nor does the word "purpose" in the McCarran-Ferguson Act require such an inquiry. The *Fabe* Court viewed the word "purpose" in the first part of § 2(b) as an expansive term that broadened the category of "business of insurance." 113 S.Ct. at 2210 & n. 6. Consistent with that view, the Court indicated that a state law would qualify as one "enacted for the purpose of regulating the business of insurance" if such regulation was its "end, intention, or aim." *Id.* at 2210 (citation omitted).

⁶ *Fabe* makes it clear that a statute need not satisfy the more restrictive language found in the antitrust exemption in order to qualify as one "enacted for the purpose of regulating the business of insurance." 113 S.Ct. at 2209. Florida's law, however, falls well within the scope of the "business of insurance" as defined in the antitrust context.

entered." *Pireno*, 458 U.S. at 130; see also George J. Couch, 9 *Cyclopedia of Insurance Law*, § 39:53, at 535 (1985) ("the risk commences upon completion of the contract in the absence of another provision"). Protecting policyholders by regulating when and how insurance contracts may be entered into constitutes regulation of the business of insurance at its most elemental level. Relatedly, the Florida law seeks to safeguard and enhance the policyholder relationship by prohibiting insurance sales by agents—holding company-owned banks—which the legislature determined would present a heightened potential for unfair or coercive practices.

Contrary to the suggestion of the United States (Br. at 11), the exceptions which Florida's law provides for independent banks and for bank holding companies exempt under § 4(d) of the Bank Holding Company Act, 12 U.S.C. § 1843(d), are fully consistent with the goal of protecting policyholders from overreaching.⁷ These exceptions show that Florida was concerned with regulating those banks that, in the legislature's view, were most likely to have sufficient economic power to engage in abuses such as tying. Federal law reflects a similar concern with the concentrated economic power of most bank holding companies, and likewise recognizes exceptions for entities of limited economic influence. See 12 U.S.C. § 1843(d)(3) (providing certain exemptions for bank holding companies with insufficient economic power to engage in anticompetitive practices such as tying); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 46 (1980) (Bank Holding Company Act was intended "to prevent anticompetitive tendencies" resulting from common ownership of banking and nonbanking enterprises); Pauline

⁷ The United States' criticism of the exceptions found in Florida's law amounts to an equal protection argument, an issue not before the Court. In any event, as the Florida courts have held, the classifications drawn in Florida's law are clearly rational ones. See *Glendale Federal S&L v. Dep't of Insurance*, 587 So.2d at 537; cf. *Ezzon v. Maryland*, 437 U.S. at 124-28.

B. Heller, *Federal Bank Holding Company Law* § 1.06[1] (1995 ed.) (noting that federal law places more stringent requirements on bank holding companies than on independent banks).

Finally, it is clear that Florida's regulation places limits only on the activities of entities within the insurance industry. Florida's statute regulates holding company-owned banks only insofar as they seek to become marketers of insurance. Regulation of insurance does not fall outside the scope of the "business of insurance" merely because such regulation affects entities that have business interests in addition to insurance.

"[W]hatever else was said in *Royal Drug* about the indispensable characteristic of risk-spreading, the Court found the contractual relationship between the insurer and the insured to be the essence of the 'business of insurance.'" *Pireno*, 458 U.S. at 136 (Rehnquist, J., dissenting). The Florida law was clearly enacted for the purpose of regulating this core component of the business of insurance. It limits the conditions under which insurers may use agents to form contracts with insureds, in order to reduce the risk of unfairness in the policyholder relationship.

Indeed, policyholder protection, the goal of the Florida law, is one of the principal purposes for which the "business of insurance" has historically been regulated. State insurance licensing requirements, a fundamental aspect of insurance regulation, are primarily designed to protect consumers.⁸ In *Robertson v. California*, 328 U.S. 440 (1946), the Court upheld against a Commerce Clause challenge a California requirement that insurance agents meet certain conditions to obtain a license, noting the need for such requirements in order to protect the public:

⁸ Almost all States have detailed insurance regulations that prohibit overreaching and misrepresentations in insurance sales and provide for license revocation in the event of violations. See John A. Appleman and Jean Appleman, 19 *Insurance Law and Practice* § 10557 (1982).

We accept the regulation for what [it] purports to be on its face and by the statute's express declaration, namely, a series of regulations designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship. That such dangers may exist, may even be widely prevalent in the absence of such controls, is a matter of common knowledge and experience.

Id. at 447.⁹

Statutes like Florida's, which limit the types of business entities that may sell certain types of insurance, are essential components of insurance licensing regulation designed to protect consumers. As the Court explained in *Robertson*,

It would be idle to require licensing of insurance agents, in order to secure honesty and competence, yet to place no restraint upon the kind of insurance to be sold or the kinds of companies allowed to sell it, and then to cover their representatives with their immunity.

Id. at 457.

The specific problem Florida sought to target in its insurance regulation—the potential for coercive "tying" practices—has been recognized as among the most difficult to regulate:

⁹ See also Robert E. Keeton and Alan I. Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* § 8.2(a), at 938-39 (1988) (stating that a major objective of insurance regulation is "to avoid overreaching by insurers"; such regulation "is principally directed at marketing practices and arrangements, [and] has been imposed by both statutes and judicially created doctrines") (footnotes omitted); Ronald T. Anderson, *Agents' Legal Responsibility* 21 (1980) ("Obviously, most insurance producer licensing is for purposes of protecting the public.").

One of the troublesome areas in the regulation of both insurance marketing generally and sales representatives in particular concerns tie-in transactions. For example, a legal entity engaged in consumer financing may seek either to function as an agent for the sale of credit life insurance or to participate in an arrangement in which persons associated with it do so as individuals. . . . The tie-in arrangements, which are frequently commercially advantageous, have been involved in substantial abuses. Efforts to regulate such tie-in arrangements have sometimes succeeded and sometimes failed.

Keeton & Widiss, *Insurance Law*, § 8.2(b), at 941 (footnotes omitted).¹⁰ The Florida law, which is based on the legislative judgment that insurance sales by holding company-owned banks present an unacceptable risk of such overreaching, is clearly one enacted for the purpose of regulating the business of insurance. Florida's statute regulates the relationship between insurance companies and policyholders by restricting the circumstances under which that relationship may be created (see *Nat'l Securities*, 393 U.S. at 460), and plainly affects practices that are an "integral part of the policy relationship between the insurer and the insured." *Pireno*, 458 U.S. at 129.

¹⁰ See generally U.S. General Accounting Office, *Bank Powers: Issues Relating to Banks Selling Insurance* (1990) (GAO/GGD-90-113) (noting potential for tying or perceived tying in context of bank sales of insurance); see also Spencer L. Kimball and Bartlett A. Jackson, *The Regulation of Insurance Marketing*, 61 Colum. L. Rev. 141, 156 (1961) (tying "difficult to prevent because of the difficulty of proof when the coercion is subtle").

The GAO report pointed out certain subtler risks as well, including consumer perceptions of tying pressures even if such pressures were not overtly intended by the financial institution, *Bank Powers* at 19, or coercion stemming from a bank's refusal to accept insurance binders from other insurers. *Id.* at 22. Moreover, the GAO found the risk of tying likely to be greater in small towns having a limited number of insurance agents. *Id.*

Petitioner attempts to draw Florida's law out of the compass of McCarran-Ferguson by arguing that it cannot qualify as "regulation." Toward that end, petitioner characterizes the law as an "isolated, sporadic and pinpointed foray[]" and as "random prohibitory legislation." Pet. Br. 23. These arguments are without merit.

While it is true that "Congress' purpose [in McCarran-Ferguson] was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," *Prudential*, 328 U.S. at 429, there is no support for petitioner's contention (Br. at 22-23) that Congress meant thereby to protect only *entire* regulatory systems adopted in a single sweep. This Court has always recognized that States may legislate policy in an incremental fashion, see, e.g., *Clover Leaf Creamery*, 449 U.S. at 466; *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955), and nothing in the broad language of the McCarran-Ferguson Act suggests that Congress wished to bar the States from regulating the business of insurance in this manner. On the contrary, McCarran-Ferguson was designed to restore to States the plenary authority and discretion they had always enjoyed when regulating the business of insurance. See *Prudential*, 328 U.S. at 430 (Congress "declar[ed] expressly and affirmatively that continued state regulation and taxation of this business is in the public interest"), quoted in *Fabe*, 113 S. Ct. at 2207. See also *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 319 (1955) (purpose of McCarran-Ferguson is "to assure that existing state power to regulate insurance would continue").

Also without merit is petitioner's suggestion that Florida's law does not constitute "regulation" because it operates by prohibiting certain conduct. Every regulation constitutes a "prohibition" from engaging in certain conduct, if the conditions set forth in the regulatory scheme

are not met.¹¹ Indeed, the Court expressly rejected a proffered distinction between prohibition and regulation in *FTC v. National Casualty Co.*, 357 U.S. 560 (1958) (*per curiam*):

[Petitioner] urges that a general prohibition designed to guarantee certain standards of conduct is too "inchoate" to be "regulation" until that prohibition has been crystallized into "administrative elaboration of these standards and application in individual cases." However, assuming there is some difference in the McCarran-Ferguson Act between "legislation" and "regulation," nothing in the language of that Act or its legislative history supports the distinctions drawn by petitioner.

Id. at 564-65. Cf. *Robertson v. California*, 328 U.S. at 452-53 & n.15 (rejecting argument that insurance licensing requirements constituted prohibition of interstate commerce rather than insurance regulation).

Nor is there any substance to petitioner's asserted distinction between regulations targeted at "policyholders" and those, like Florida's, that can be viewed as protecting "potential policyholders." Any regulation of insurance marketing and sales practices, like the Florida statute, protects potential policyholders, and such regulation is indisputably part of the "business of insurance." See, e.g., *National Securities*, 393 U.S. at 460 ("[t]he selling and advertising of policies" falls within the scope of the "business of insurance"). By prohibiting agency practices that the Florida legislature deemed likely to result in abuses of *potential* policyholders, the Florida statute also pro-

¹¹ For example, state insurance regulations dictating "the type of policy which could be issued," *National Securities*, 393 U.S. at 460, have the effect of "prohibiting" transactions involving the disallowed types of policies. Similarly, licensing requirements for insurance agents obviously constitute "regulation," even though they can at times amount to a "prohibition" barring particular individuals from engaging in sales.

fects *actual* policyholders from the heightened risk of policies that do not serve their interests.¹²

Relatedly, petitioner argues that the Florida law protects only bank customers and not insurance purchasers. The fact that the Florida law regulates insurance sales by eliminating holding company-owned banks as insurance agents does not transform the statute, which is specifically designed to protect policyholders, into a generalized protection of bank customers. By petitioner's reasoning, a state law regulating the direct mail solicitation of insurance would not qualify as insurance regulation either, as it could instead be characterized as protection of U.S. postal customers or the public at large.

In sum, Florida's law, which has the purpose and effect of protecting policyholders from overreaching by agents that are bank holding company-owned banks, falls squarely within that broad category of laws enacted "for the purpose of regulating the business of insurance." Accordingly, the Florida statute plainly satisfies the first prong of the two-part test for invoking the anti-preemption rule of the McCarran-Ferguson Act.

C. Section 92 Does Not "Specifically Relate To The Business Of Insurance"

Because Florida's law was enacted for the purpose of regulating the business of insurance, it cannot be pre-

¹² Most individuals are "policyholders" (either as owner or beneficiary):

Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

South-Eastern Underwriters, 322 U.S. at 540 (footnote omitted). The question, then, is usually not *whether* a policyholder relationship will be formed, but only where, when, and under what circumstances.

empted by a conflicting federal law unless that law "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Under this Court's decisions, a federal statute does not satisfy this exacting preemption standard unless it contains a "clear statement" of preemptive intent, see *Fabe*, 113 S.Ct. at 2211, or "expressly provide[s]" for such preemption. *Prudential*, 328 U.S. at 429. Section 92 does not contain any language stating that it is intended to preempt conflicting state laws. While this lack of express preemptive language alone should be determinative, it is clear from the text, history, and structure of both Section 92 and the McCarran-Ferguson Act that Section 92 does not have preemptive force.

The structure of the McCarran-Ferguson Act reflects Congress' intent that States have broad authority to regulate the business of insurance in such key areas as policyholder protection, subject only to intentional, conscious abrogation by Congress. The category of federal laws "specifically relat[ing] to the business of insurance" thus represents a narrow exception carved out of the broad authority granted States to enact laws "for the purpose of regulating the business of insurance."

Further, both the legislative history and the text of the McCarran-Ferguson Act reflect a Congressional concern that state insurance law not be displaced through mere inadvertence or through laws directed at other matters. See 91 Cong. Rec. 485 (1945) (statement of Senator Revercomb) ("We want the business [of insurance] left in the control of the States, unless by enactment in the future we specifically state that we do not want something they are doing to be continued.").¹⁸

Petitioner does not attempt to demonstrate how Section 92 "specifically relates to the business of insurance." Instead, petitioner simply asserts that Section 92 must

¹⁸ See also *Fabe*, 113 S.Ct. at 2211 n.7 (quoting 91 Cong. Rec. 1487 (1945) (statements of Senators Ferguson and Mahoney)).

"specifically relate to the business of insurance" if Florida's law is found to be a law enacted "for the purpose of regulating the business of insurance." Petitioner's assertion is flawed because it fails to take account of the different formulations of the two statutory tests, which together reflect the purpose of the McCarran-Ferguson Act.

Petitioner places great emphasis on the fact that Florida's law prohibits bank sales of insurance while Section 92 permits such sales. See, e.g., Pet. Br. 41, 47; see also Br. Am. Cur. U.S. 23. But that fact, while true, proves nothing. Section 2(b) of the McCarran-Ferguson Act only comes into play when there is an "Act of Congress" which could potentially "be construed to invalidate, impair, or supersede" a state law enacted for the purpose of regulating the business of insurance. In every such instance, it will necessarily be the case that the federal law will permit, prohibit, or require some specific conduct that the State has also sought to regulate as part of "the business of insurance."¹⁴ If that were sufficient, as a matter of law, to qualify the federal law as one "specifically relat[ing] to the business of insurance," Section 2(b) of the McCarran-Ferguson Act would be meaningless.

Under petitioner's interpretation, the second clause of Section 2(b), allowing preemption where a conflicting federal law "specifically relates to the business of insurance," would, as a practical matter, nullify the first clause, and would allow the States the power to enact laws "for the purpose of regulating the business of insurance" only where federal law was not in conflict. Under that approach, the whole objective of Congress to preserve state insurance regulation by establishing a special presumption

¹⁴ For example, the effect of the federal statute at issue in *Fabe* was to prohibit giving insurance policyholders priority over federal claimants in bankruptcy. Yet despite this direct conflict with a state law regulating the business of insurance, it was agreed by the parties that the federal law was not one that "specifically relates to the business of insurance." See 113 S.Ct. at 2208.

against preemption would be defeated. Petitioner's construction must therefore be rejected, because it "offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect," and that an interpretation should be rejected if it would render one provision "superfluous" or "nugatory." *Weinberger v. Hyson, Westcott and Dunning, Inc.*, 412 U.S. 609, 633-34 & n.26 (1973). In contrast, the Court's requirement of a clear statement to overcome the presumption against preemption of state insurance regulation gives Section 2(b) a meaning that is fully consistent with the purpose of the McCarran-Ferguson Act.

In fact, it should not be at all surprising that a state law prohibiting certain conduct in order to protect policyholders could be one enacted "for the purpose of regulating the business of insurance," while a federal law merely allowing the same conduct (and thereby having no definitive effect upon the policyholder relationship) would not qualify as one "specifically relat[ing] to the business of insurance." Unlike Florida's law, Section 92 does not set the terms under which insurance sales to consumers will take place and, therefore, does not safeguard or otherwise affect the policyholder relationship. Section 92 does not purport to affect any of the elements that this Court has found to be at the "core" of the "business of insurance": the terms of the insurance contract, the spreading and underwriting of risk, and, perhaps most importantly, the policyholder relationship. *See, e.g., Royal Drug*, 440 U.S. at 211-16; *Pireno*, 458 U.S. at 127-30; *Fabe*, 113 S.Ct. at 2208-09; *National Securities*, 393 U.S. at 460. Instead, Section 92 simply permits a national bank located in a small town to enter into an agency contract with an insurance company that is authorized under state law to do business in that locality.

In arguing that Section 92 must "specifically relate to the business of insurance," petitioner also relies heavily on the broad meaning given the words "relate to" in other

statutes, such as ERISA and the Airline Deregulation Act of 1978. *See* Pet. Br. 43 & n.4. This reliance is misplaced. Not only do the other statutes referenced by petitioner fail to contain the important qualifier "specifically," they are also vastly different from the McCarran-Ferguson Act in their structure, objectives, and broad preemptive effect, making them inapt as analogies here. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1982) (referencing ERISA's "virtually unique pre-emption provision"), *quoted in Morales v. Trans World Airlines*, 112 S.Ct. 2031, 2054 (1992) (Stevens, J., dissenting).

The Court has repeatedly warned against undue reliance on a single word or phrase in interpreting a statute; instead, the statute as a whole must be considered. "On numerous occasions we have noted that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (citations and internal quotation marks omitted); *see U.S. National Bank v. Independent Ins. Agents*, 113 S.Ct. 2173, 2182 (1993) (invoking same rule in interpreting Section 92); *see also Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (opinion of O'Connor, J.) ("Our ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole."). This is particularly important where the words upon which a party relies are as inherently indeterminate as the ones petitioner relies on here. As the Court recently noted in an ERISA case:

If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere." . . . We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute

as a guide to the scope of the state law that Congress understood would survive.

N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S.Ct. 1671, 1677 (1995) (citation omitted). And an analysis of the structure and purpose of both Section 92 and the McCarran-Ferguson Act makes clear that Florida's law is not preempted.

Section 92, which is part of the Federal Reserve Act, was enacted in 1916, "at a time when the business of insurance was believed to be beyond the reach of Congress' power." *Fabe*, 113 S.Ct. at 2212; see Pet. App. 15a. Section 92 contains absolutely no indication that Congress consciously intended to displace state authority over the business of insurance where national banks are concerned. On the contrary, it specifically refers to the States' authority over the issuance and sale of insurance policies. See 12 U.S.C. § 92 (banks may "act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State").

Section 92 does one thing only: it allows national banks to act as agents for insurance companies and thereby permits such banks to engage in an additional line of business which could enable them to become more profitable. As petitioner explains,

The statute [Section 92], its history, and its construction by Comptrollers since 1916 thus leave no doubt that the purpose and effect of the statute are, as the Seventh Circuit recently put it, to "identif[y] a line of business in which national banks may engage."

Pet. Br. 14-15 (quoting *NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995)).

Providing for this possibility for enhancement of national bank revenues was not only the sole purpose of Section 92, as shown by its legislative history, see Br.

Am. Cur. U.S. at 20-21, but also its only practical function and effect. Section 92 has nothing to say (either in its text or in its operation) about the regulation of insurance companies or the protection of policyholders. Section 92 refers only to the relationship between insurance companies and the national banks acting as their agents. Indeed, Section 92 makes clear that "the authorities of the State" in which each national bank is located will determine whether any particular insurance company is "authorized" to offer insurance in that State. Because Section 92 neither establishes any standards nor provides any protections that would affect insurance companies, the policyholder relationship, the insurance contract, or the spreading or transfer of risk, Section 92 does not "specifically relate" to the "business of insurance" as defined by this Court's decisions. See *National Securities*, 393 U.S. at 460; *Pireno*, 458 U.S. at 129.

That Section 92 has no preemptive effect where state laws regulating the business of insurance are concerned is further demonstrated by the fact that national banks selling insurance are viewed by the United States as properly subject to all other forms of state insurance regulation, short of prohibition.¹⁵ If petitioner were correct in

¹⁵ See Br. *Am. Cur.* U.S. 12 ("The government has never argued that Section 92 would preempt the application of such reasonable and generally applicable [sales and licensing] regulations, so long as they are neither designed nor applied differentially to exclude national banks from undertaking insurance activities authorized by federal law."). See also *id.* at 13 ("McCarran-Ferguson's protection would . . . presumably extend to reasonable categorical exclusions relevant to the protection of present or potential policyholders.").

As stated in note 18, *infra*, the OCC has not adopted any formal regulations governing the methods used by national banks in selling insurance under § 92. In contrast, the OCC *has* adopted regulations which restrict the terms under which national banks may sell credit life, health, and accident insurance, which (unlike regular life insurance) are forms of insurance that national banks may sell pursuant to their general banking powers under 12 U.S.C. § 24 (Seventh). See 12 C.F.R. Part 2.

asserting that Section 92 grants national banks in small communities a comprehensive right to sell insurance free of state interference as a means of supplementing their income, and in further asserting that Section 92 preempts any state insurance regulation that constitutes "an obstacle to the accomplishment and execution of the full purposes and objectives" of [federal law]," *see* Pet. Br. 16-17 (citations omitted), then *no* state insurance regulation of sales of insurance by national banks could stand.¹⁶ For example, insurance rate regulation, presumed to be applicable to sales made by national banks, *see* GAO, *Bank Powers* at 13, could limit those banks' competitive advantage. *Id.* at 16.¹⁷

¹⁶ It is significant that the OCC, in areas unrelated to insurance, has consistently taken the position that it has exclusive authority to regulate national banks, with the result that all state licensing, recordkeeping, and registration requirements are preempted. *See, e.g.,* Comptroller Interp. Letter No. 614 [1992-93 Transfer Binder] Fed. Banking L. Rep. (CCH) Par. 83,454 (Jan. 15, 1993) at 71,579:

As instrumentalities of the federal government, national banks' powers are granted by Congress. One of the powers expressly granted to national banks by federal law is that of lending money on personal security. 12 U.S.C. § 24 (Seventh). The exercise of this power cannot be subject to the approval of state officials, and states have no power to require national banks to obtain a license to engage in an activity that is permitted to them by federal law. The OCC consistently has taken the position that state laws that attempt to license the lawful activities of national banks, whether domiciled in that state or not, are preempted.

(citations omitted). *See also* Comptroller Interp. Letter No. 616 [1992-93 Transfer Binder] Fed. Banking L. Rep. (CCH) Par. 83,456 (Feb. 26, 1993) at 71,583 (state requirement that bank provide information is preempted; collecting past interpretive letters preempting similar state disclosure laws).

¹⁷ Likewise, anti-tying regulations, which the United States considers a legitimate exercise of state authority, *see* Br. Am. Cur. U.S. 14, could limit the ability of national banks to derive income from insurance sales by eroding their cost advantages. *See* GAO, *Bank Powers* at 25 ("Some of these measures [to reduce the risk

Thus, the logical implication of finding Section 92 to have preemptive force in the present case would be directly to undermine the McCarran-Ferguson Act by prohibiting the States from imposing any significant limitation on insurance sales by national banks pursuant to Section 92. Given the Comptroller's view that national banks may sell insurance without geographical limit, as long as such sales are made through a small town office, *see supra* p. 2, the result would be a significant erosion of state authority over insurance sales—a result flatly inconsistent with the objectives of the McCarran-Ferguson Act.¹⁸

In sum, Section 92 does not satisfy the heavy burden it must meet to preempt Florida's statute because Section

of coercive tie-ins] . . . may reduce or eliminate the cost savings that might otherwise flow from the joint marketing of banking and insurance services.").

¹⁸ Such a federally-created zone in which insurance vendors could operate free of state control would undermine the consumer protection interests the McCarran-Ferguson Act seeks to safeguard. Proposals which would have removed insurance sales from state regulatory oversight have been repeatedly and soundly rejected by Congress—with good reason. *See South-Eastern Underwriters*, 322 U.S. at 592 n.15 (Jackson, J. dissenting).

As Louis Brandeis, speaking as counsel for the Protective Committee of Policyholders in the Equitable Life Assurance Society (Oct. 26, 1905), explained in opposing a bill to federalize insurance regulation:

It [the Dryden bill] seeks to rob the State even of the right to protect its own citizens from the legalized robbery to which present insurance measures subject the citizens, for by the terms of the bill a Federal license would secure the right to do business within the borders of the State, regardless of the State prohibitions, free from the State's protective regulations.

South-Eastern Underwriters, 322 U.S. at 593 n.17 (Jackson, J., dissenting) (quoting Brandeis statement).

It is noteworthy that the OCC's sole formal regulation under Section 92—12 C.F.R. § 7.7100—simply reiterates the authority of national banks to sell insurance from bank offices located in towns of less than 5,000. The regulation does not contain any provisions regulating insurance sales practices or otherwise protecting consumers.

92 does not “specifically relate” to the business of insurance within the contemplation of Section 2(b) of the McCarran-Ferguson Act. Accordingly, the second prerequisite for applying the anti-preemption rule of Section 2(b) has clearly been met in this case. Petitioner’s attempt to subordinate state regulation of insurance sales by national banks to the terms of Section 92 is fundamentally at odds with both the terms and purpose of the McCarran-Ferguson Act. That Act was expressly designed to preserve to the States the very type of regulatory authority exercised by Florida here—regulation directed at protecting policyholders from improper practices in the sale of insurance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Of Counsel

ARTHUR E. WILMARTH, JR.
Associate Professor of Law
George Washington
University Law School
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-6386

December 7, 1995

RICHARD RUDA *

Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL
CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the*
Amici Curiae

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QUESTIONS PRESENTED

1. Whether Petitioner has produced an unambiguous showing that, in enacting 12 U.S.C. § 92 with the goal of permitting small-town national banks to generate supplemental revenues by engaging in the state regulated business of selling insurance, Congress expressed its "clear and manifest intent" to preempt traditional state law controlling the identities and activities of those licensed to sell insurance in the State?
2. Whether a state law that protects current and potential future policyholders by prohibiting licensed agents from affiliating with certain financial institutions was "enacted for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1102(b)?
3. Whether a provision of federal law buried in the Federal Reserve Act that grants some national banks charter authority to participate in the state regulated business of selling insurance, but expresses no intent to intrude upon traditional state insurance regulation, and was enacted at a time when Congress believed itself to lack constitutional authority so to intrude, "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1102(b)?

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IN THE Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1837

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

— v. —

TOM GALLAGHER, INSURANCE COMMISSIONER OF THE STATE
OF FLORIDA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE THE COUNCIL OF INSURANCE AGENTS AND BROKERS IN SUPPORT OF THE RESPONDENTS

PRELIMINARY STATEMENT

The Council of Insurance Agents and Brokers respectfully submits this brief as amicus curiae in support of the Respondents, in accordance with Rule 37.3 of the Rules of the Supreme Court of the United States. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICUS CURIAE

Since almost the inception of the institution of insurance, insurance agents have been the embodiment of insurers in their dealings with policyholders and potential policyholders. In that role, insurance agents and brokers have been on the front line of insurance regulation for more than one hundred years. The modern insurance agent is characterized by a high degree of professionalism, and takes seriously the responsibility of assisting insurance purchasers obtain reliable and appropriate insurance products. At stake in this case is the continued vitality of the state regulatory schemes that have fostered and guided the development of the role of the agent during this entire period— regulatory schemes from which the petitioner and its amici, in essence, now ask this Court to exempt a class of powerful financial institutions, based upon 12 U.S.C. § 92 (1916) ("Section 92"), which extended to national banks, located in small towns with a population of five thousand or less, the ability to engage in the business of insurance as agents.

The Council of Insurance Agents and Brokers (the "Council") is an unincorporated national trade association, founded in 1913 as the National Association of Casualty and Surety Agents. Today, the Council represents some 300 of the nation's largest commercial property and casualty insurance agencies and brokerage firms. Council members, who operate both nationally and internationally, conduct business in more than 2,000 locations, employ more than 120,000 people, and annually place 75 percent —some \$90 billion— of commercial property and casualty insurance premiums in the United States. In addition, Council members specialize in a wide range of insurance products and risk management services for

business, industry, government, and the public. Council members also administer billions of dollars in employee benefits.

The Council is committed to promoting standards of excellence among insurance agents and brokers, and carries out that commitment through training, education, and research programs. The Council collaborates with the Wharton School of Business at the University of Pennsylvania in the development of course material on the subject of agency management. The Council sponsors workshops on financial management, commercial lines placement, and sales for its members. The Council also maintains a non-profit educational foundation, the Foundation for Agency Management Excellence, created to promote leadership and excellence in the community of agents and brokers.

The Council is also leader in the discussion and debate, within the industry and on public fora, on issues affecting the future of insurance. It has actively participated in debates over legislative and regulatory initiatives, at the state and federal levels, affecting the institution of insurance, including debates over such issues as federal regulation, health care, environmental liability, and licensing reform. The Council has been active in this regard since its inception, and was a participant in the debates that attended the passage of the McCarran-Ferguson Act, 12 U.S.C. § 1101 et seq.

SUMMARY OF ARGUMENT

The Council respectfully submits that Section 92 cannot be properly construed to achieve the result that Congress, merely by enabling some national banks to engage in the state regulated business of insurance as agents, effectively swept away a cornerstone of the system of regulation commonly employed by the states to regulate the traditional business of private insurance, an industry the regulation of which has long been reserved to the states.

The licensure of insurance agents and brokers is central to the various state regulatory schemes for the regulation of the marketing and sale of insurance. The role of the agent or broker is a key part of the core relationship between the insurer and the insured that is regulated exclusively by the states, and licensure is the principal mechanism by which the persons or entities filling that role are regulated. When it enacted Section 92 in 1916, Congress did not believe it possessed any authority under the Constitution to regulate the business of insurance. Nor did Congress, in the language of Section 92, or in the legislative history attending its enactment, evidence any intention to displace any aspect of state regulation of the business of insurance, or to constitute national banks as a privileged class of insurance agents, free of state licensure requirements. Moreover, Congress's subsequent enactment of the McCarran-Ferguson Act should be viewed in this context as an explicit renunciation by Congress of any intent to interfere with any aspect of the state insurance regulatory scheme, including the licensure of agents and brokers.

Set against this background, Section 92 cannot be viewed as an "Act [that] specifically relates to the business of insurance" under Section 2(b) of the Rule 37.3 of the Rules of the Supreme Court of the United States. Rather, Section 92 is merely an *enabling* provision, required to grant some national banks the corporate capacity to enhance their revenues by engaging in a state regulated business unrelated to that of banking. Section 92 is not, as petitioners contend, an *empowering* statute, authorizing those national banks within its purview to sweep aside state insurance regulation, and compete unfairly with traditional insurance agents and brokers who have met, and continue to be subject to, the burdens of state licensure.

ARGUMENT

I. STATE LICENSURE PROVISIONS ARE THE CENTRAL ELEMENT OF THE REGULATION OF THE MARKETING, SALE, AND OTHER ASPECTS OF THE RELATIONSHIP BETWEEN INSURERS AND THEIR INSURED.

Laws regulating the licensing of insurance agents and brokers protect the relationship between insurers and their insured by attempting to ensure that prospective policyholders obtain reliable insurance that is adequate for their needs. Almost fifty years ago, this Court recognized, in *Robertson v. People of the State of California*, 328 U.S. 440 (1946), that insurance agent licensing laws constitute a:

series of regulations designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of

insurance by personal solicitation and salesmanship. That such dangers may exist, may even be widely prevalent in the absence of such controls, is a matter of common knowledge and experience.

Robertson, 328 U.S. at 447 (cited with approval in *SEC v. National Securities*, 393 U.S. 453, 460 (1969)).

A leading commentator on insurance law notes that licensing laws are enacted "to protect the public from surrendering its money in exchange for questionable or worthless pieces of paper denominated insurance policies." 16 JOHN J. APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 8632 (citing cases); *Accord, e.g., Rizzo v. Price*, 294 A.2d 541, 543 (Conn. 1972) ("Since those purchasing insurance must rely on the advice of the agent and purchase insurance from or through him, the legislature sought to protect the public by a licensing procedure which insures that those engaged in the business are qualified."); *Wright v. Trotta*, 367 A.2d 557, 562 (Md. App. 1976) (same); *Great National Life Ins. Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex. 1964) (quoting APPLEMAN); *Waite v. Holmes*, 327 P.2d 399, 407 (Mont. 1958) (same); *State ex rel. Herbert v. Standard Oil Co.*, 35 N.E.2d 437, 440 (Ohio 1941) (same); *Black Motor Co. v. Baughman & Datron Ins. Agency*, 160 S.W.2d 388, 390 (Ky. 1942) (same).

The regulation of the business of insurance by the states has been effected in large part by the regulation of insurance agents through licensure schemes for more than a hundred years. An early administrative law treatise, which in 1927 took the state regulation of the business of insurance as its subject, noted that the distinction between the license for an

insurance company and the licensing of the company's agents was "frequently ... obscured," and went on to note that "[s]ometimes the statutes me no provision for the issuance of a license or certificate of authority to the company as distinguished from the licenses issued to the agents, and control of the company is affected by a general revocation of all of its agent's licenses." EDWIN W. PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* 157 (1927) (footnotes omitted). The treatise discussion demonstrates that at this time, roughly contemporaneous with the passage of Section 92, the power to exclude inappropriate persons or entities from becoming licensed insurance agents, or to revoke the licenses of agents who had failed to conform to appropriate standards was a key element of broad-ranging regulation of the marketing and sale of insurance products, aimed at such concerns as misrepresentation in marketing, price discrimination or rebating, and the tying of insurance products to other goods and services, including the sale of stock. *See, generally*, PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES*, § 14 at 157-84.

Currently, virtually every state has some licensure provision for insurance agents. Typically, the state regulations impose education requirements upon applicants for licenses, require that applicants for the license pass an examination on insurance and insurance law, and impose continuing education requirements upon licensees. State regulatory schemes also impose significant liabilities upon agents, including civil liabilities to both insurer and insured, and civil and criminal liabilities to the state. *See, generally*, BERTRAM HARNETT, *RESPONSIBILITIES OF INSURANCE AGENTS AND BROKERS* §§ 5.05 to 5.06, 5.10 to 5.13 (1995); THE

NATIONAL UNDERWRITER CO., FC&S LICENSING, COUNTERSIGNING & SURPLUS LINES LAWS (1994) (all state survey). Licensing laws and other laws that regulate the advertising and selling of insurance policies, and the qualifications and responsibilities of insurance agents and brokers, create the context within which policyholders effect the "spreading or transfer of risk," and directly control the interface between the insurer and the insured prior to, at, and in some circumstances beyond, the point of sale.¹

The particular provision of Florida insurance law at issue here, Fla. Stat. § 626.988, contained in the Unfair Insurance Trade Practices Act of the Florida Insurance Code, is consistent with the Florida regulatory scheme as a whole. Section 626.988 prohibits insurance agents licensed in the State of Florida from being affiliated with defined classes of financial institutions, including both state and federally chartered banks and bank holding companies other than banks not affiliated with a bank holding company and located in a small town. Section 626.988 has been definitively found by the Florida courts to be a consumer protection statute that insulates policyholders and prospective policyholders from unfair coercion, "twisting" and misrepresentation, and other unfair and deceptive trade practices. See *Glendale Fed. Sav. and Loan Ass'n v. State Dep't of Ins.*, 587 So.2d 534, 535 n.1 (Fla. App. 1st Dist. 1991), *rev. denied*, 599 So.2d 656 (Fla. 1992); accord *Production Credit Ass'ns of Fla. v. Dep't*

¹ This Court has indicated that these are relevant to determining what constitutes the "business of insurance." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

of Ins., 356 So.2d 31, 32 (Fla. App. 1st Dist. 1978) ("The Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest.").

II. BECAUSE CONGRESS DID NOT BELIEVE IT COULD CONSTITUTIONALLY INTRUDE UPON THE REGULATION OF THE TRADITIONAL BUSINESS OF PRIVATE INSURANCE WHEN SECTION 92 WAS ENACTED, IT COULD NOT HAVE INTENDED THAT ENACTMENT TO PREEMPT THE LICENSURE OF AGENTS BY THE STATES.

A. Prior to the 1944 *South-Eastern Underwriter Ass'n* Decision, This Court Had Consistently Instructed Congress that It Was Without Constitutional Authority to Regulate the Traditional Business of Private Insurance.

From at least as early as this Court's decision in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 182-85 (1869), until the decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), Congress believed that it lacked any power under the Constitution to enact legislation affecting the business of insurance in any way. In *Paul*, an insurance agent subjected to a fine by the Commonwealth of Virginia for selling coverage by a New York insurer not licensed in Virginia argued in effect that the Virginia licensing requirement was a burden on interstate commerce. The argument was rejected by the Court, on the ground that contracts for insurance did not constitute commerce, and was not an interstate transaction, but that the contract for

insurance was entirely a local transaction, governed wholly by local law.

The Court consistently took the same view in a line of subsequent cases, including several involving the application of state sanctions (including fines and deprivation of access to the courts to sue for premiums) for violations of insurance company or insurance agent licensing requirements. *E.g.*, *Hooper v. California*, 155 U.S. 648, 649 (1895); *Noble v. Mitchell*, 164 U.S. 367, 368-69 (1896); *Nutting v. Massachusetts*, 183 U.S. 553, 556 (1902); *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 247 U.S. 132 (1918); *Bothwell v. Buckbee, Mears Co.*, 275 U.S. 274, 275-76 (1927).

That view of the law changed with this Court's decision in *South-Eastern Underwriters Ass'n*. In that case, the Court did not expressly overrule its prior line of decisions, and did not expressly find that contracts for insurance themselves were suddenly to be deemed within Congress's power to regulate under the Commerce Clause. The Court did find, however, that Congress intended the Sherman Act to reach to the fullest extent of its power (322 U.S. at 558), and reasoned further, in light of other decisions applying the Commerce Clause power to a host of activities including some that were "non-commercial ... illegal and sporadic," announced that "it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation..." (322 U.S. at 549-50). Following this line of reasoning, the Court held that the Sherman Act applied to the activities of insurance companies. The Court did not attempt to address any consequences its decision might have regarding the interplay between

Congress's power under the Commerce Clause, and the traditional regulation of the insurance business by the states.

B. By Its Enactment of the McCarran-Ferguson Act, Congress Renounced Preemption of State Regulation of the Traditional Business of Private Insurance in the Absence of a Clear Statement of Contrary Congressional Intent.

The decision in *South-Eastern Underwriters Ass'n* placed the relationship between the traditional regulation of insurance by the states, and Congress's reinterpreted and expanded Commerce Clause power, into jurisdictional limbo. Congress quickly addressed this situation by enacting the McCarran-Ferguson Act, 15 U.S.C. § 1101 et seq. *See FTC v. Travelers Health Ass'n*, 362 U.S. 293, 299 (1960).

In The McCarran-Ferguson Act, Congress acquiesced in the Court's specific decision in *South-Eastern Underwriters Ass'n* regarding the reach of the federal antitrust laws, but mitigated the effect of the decision by providing that federal antitrust laws would be phased into effect in the insurance industry after a waiting period, and then only to the extent that the states had not occupied the field in the interim. 15 U.S.C. § 1102(b) (proviso). Unable to restore the status quo existing before *South-Eastern Underwriters Ass'n* short of a constitutional amendment limiting the scope of the Commerce Clause, it "transformed the legal landscape by overturning the normal rules of pre-emption." *United States Dep't of Treasury v. Fabe*, 113 S.Ct. 2202, 2211 (1993). It did so by making it clear that its silence regarding any exemption of the business of insurance from an exercise of federal power (which the Court in *South-Eastern Underwriters Ass'n* had

interpreted as a refusal to exempt (322 U.S. at 556-57)), should not in the future be so construed. 15 U.S.C. § 1101 ("silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of [the business of insurance] by the several states.") Instead, Congress provided, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance...." 15 U.S.C. § 1102(b). As this Court found in *Fabe*, Congress created a "clear-statement rule" barring preemption unless the "federal statute specifically requires otherwise." *Id.*

The form of Congress's response in The McCarran-Ferguson Act to *South-Eastern Underwriters Ass'n* leaves no doubt that Congress, prior to 1944, had not intended to, and did not believe it had, preempted or displaced any state regulation of the business of insurance. Once informed that it *had* the power to legislate regarding the business of insurance, and had exercised that power *sub silentio*, Congress acted quickly to change the interpretive framework of preemption in the area of insurance precisely so as to prevent the outcome now urged by petitioner from ever happening again.

It can fairly be concluded from Congress's corrective approach to *South-Eastern Underwriters Ass'n*, embodied in The McCarran-Ferguson Act, that Congress did not believe that it had at any time prior to that decision intended to enact any legislation that met the "specifically relates" test of 15 U.S.C. § 1102(b). Indeed, petitioner tries to head off the effect of this argument by presenting it as a *reductio ad*

absurdum derived from the reasoning of the Eleventh Circuit below. Petitioner's Brief at 46-47. But far from being absurd, this conclusion is manifestly correct; indeed, none of the arguments petitioner opposes to this conclusion withstands scrutiny.

Petitioner asserts that this conclusion "is contrary not only to [the McCarran-Ferguson Act's] plain language, but also to the clearly expressed views of its sponsors." Petitioner's Brief at 46. Presumably petitioner infers that because the Act itself contemplates retroactive application of the "specifically relates" test, there must exist legislation that meets the test. This inference is a leap unsupported by logic, however. But for the retroactive application of the "specifically relates" test, it would be possible for a court to determine with respect to other pre-McCarran-Ferguson Act enactments, as this Court did in *South-Eastern Underwriters Ass'n*, that Congress had legislated in this area *sub silentio*. But the retroactive imposition of the "specifically relates" test does no more than bar such a result; it does not imply that prior legislation exists that would *pass* the test.

Petitioner's reading of the legislative history betrays a similar lapse of logic. The specific colloquy petitioner points to does not contain an affirmation by the sponsors of the McCarran-Ferguson Act that previous legislation can be found that meets the "specifically relates" test. Indeed, the discussion between Senator Murdock and Senator Ferguson is directed at the converse conclusion. Senator Murdock is concerned with addressing the effect of the McCarran-Ferguson Act's language on previous legislation—specifically, the Sherman Act—that *fails* to meet the "specifically relates" test. He notes, given that failure, that

the provisions of Section 2(b) of the bill would permit states to "repeal," in effect, the application of the Sherman Act "insofar as it relates to the insurance business." He then proffers a technical modification to the text of the bill before the Senate, giving the antitrust provision contained in Section 4 of the bill precedence over the entire Act, that would prevent such an outcome, and Senator Ferguson accepts the amendment. Neither Senator addresses, at any point, the existence of previous legislation that might *meet* the "specifically relates" test, or characterizes that test as a "savings" clause. 91 Cong. Rec. 479 (1945). Indeed, petitioner's characterization as a "savings" clause a test which, if it had been applied by the Court in *South-Eastern Underwriters Ass'n* would have yielded a contrary result, barring application of the Sherman Act to the insurance business, borders on the wilfully perverse.

The cases discussed by petitioner on this point likewise fail to support its position. Two of those cases deal with Congress's ability to regulate federally created insurance or worker's compensation schemes, and are thus irrelevant to the issue presented here, or dealt with in the McCarran-Ferguson Act. *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *rev'd on rehearing on other grounds*, 862 F.2d 491, *cert. denied*, 490 U.S. 1035 (1988) (dealing with provisions of the Longshoremen and Harbor Workers Compensation Act); *Wissner v. Wissner*, 338 U.S. 655 (1950) (dealing with the constitutionality of the National Service Life Insurance Act of 1940 without addressing or applying the McCarran-Ferguson Act). Nothing in the doctrine developed in *Paul v. Virginia* or its progeny denies Congress the right to establish self-contained, federal insurance schemes; those

cases only established that the regulation of existing system of insurance based on private contract was reserved exclusively to the states. The third case discussed by petitioner is even more off the point. Although in *Hanover Ins. Co. v. Commissioner*, 598 F.2d 1211 (1st Cir.), *cert. denied*, 444 U.S. 915 (1979), the First Circuit noted that a provision of the Internal Revenue Code defining "insurance company income" passed the "specifically relates" test of the McCarran-Ferguson Act, that pronouncement was plainly dictum. An alternative, and manifestly more correct ground of decision, was available in this Court's holding in *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969): the system of federal taxation at issue in *Hanover Ins. Co.*, like the federal regulation of securities at issue in *SEC v. National Securities, Inc.*, simply does not seek to regulate "the business of insurance" at all.

Once petitioner's faulty logic is corrected, it must be concluded that the "specifically relates" test, when applied retroactively, was not intended to serve as a "savings" clause, but as a hurdle set high enough to prevent another result like that reached in *South-Eastern Underwriters Ass'n*. With this function in mind, it cannot be thought plausible that Section 92, enacted without comment to give small-town national banks charter authority to engage in the state regulated business of insurance selling, could so far clear that hurdle as to sweep away one of the central features of that state regulation: the licensure of agents. This strained reading, which without the "clear statement" this Court has found must accompany federal preemption in this area after enactment of the McCarran-Ferguson Act would have far-reaching consequences on the entire system of state regulation

of the business of insurance, must yield to the far more temperate and natural reading of that provision as an enabling act giving small-town national banks the potential— not the infeasible right — to engage in a state regulated business wholly distinct from banking.

CONCLUSION

For the foregoing reasons, The Council of Insurance Agents and Brokers, as amicus curiae, respectfully urges that this Court affirm the decision of the Eleventh Circuit below.

Washington, D.C.

December 8, 1995

Respectfully Submitted,

Mark E. Herlihy

Levi Perry Simmons & Loo's, P.C.

805 Fifteenth Street, N.W.

Washington, D.C. 20005

Tel.: (202) 325-8605

Fax: (202) 289-0184

*Counsel of Record for Amicus Curiae
The Council of Insurance Agents and
and Brokers in support of Respondents*

(21)
No. 94-1837

Supreme Court, U.S.
FILED

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IN THE
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BARNETT BANK OF MARION COUNTY, N.A.,

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for the Eleventh Circuit**

**BRIEF OF THE AMERICAN COUNCIL OF LIFE
INSURANCE AS *AMICUS CURIAE* IN SUPPORT
OF RESPONDENTS**

Of Counsel:

Gary E. Hughes
Phillip E. Stano
THE AMERICAN COUNCIL OF
LIFE INSURANCE
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2120

Martin E. Lybecker
David Overlock Stewart
Counsel of Record
James M. Lichtman
ROPES & GRAY
One Franklin Square
1301 K St., N.W.
Suite 800 East
Washington, DC 20005
(202) 626-3900

Counsel for Amicus
The American Council
of Life Insurance

December 8, 1995

Balmar Legal publishing, Services, Washington, D.C. (202) 682-9800

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**BRIEF OF THE AMERICAN COUNCIL OF LIFE
INSURANCE AS *AMICUS CURIAE* IN SUPPORT
OF RESPONDENTS**

The American Council of Life Insurance hereby files this brief as *amicus curiae* in support of the Respondents in accordance with Rule 37.3 of the Supreme Court Rules. All parties have consented to the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The American Council of Life Insurance ("ACLI") is a non-profit trade association of 640 stock and mutual life insurance companies. Collectively, ACLI member companies hold approximately 91 percent of the life insurance in force in the nation. ACLI has long been active in administrative, legislative,

and litigation matters regarding the permissible scope of insurance activities by banks.

ACLI has a strong interest in this case. Petitioner advances an interpretation of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, that would significantly diminish the power of states to regulate the business of insurance. Indeed, ACLI is concerned that Petitioner and its *amici* seek much more than the invalidation of the Florida anti-affiliation statute at issue here. Rather, they seek a fundamental dismantling of state insurance regulation. ACLI members would be adversely affected by such an outcome, which would violate both the letter and spirit of the McCarran-Ferguson Act.

SUMMARY OF ARGUMENT

In adopting the McCarran-Ferguson Act in 1945, "Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946). "There is no question that the *primary* purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 218 n. 18 (1979) (emphasis in original).

Section 2(b) of the Act implements this policy by reversing ordinary federal preemption principles for state insurance laws that were enacted "for the purpose of regulating the business of insurance." The only exception to this reverse preemption is for conflicting federal laws that "specifically relate[] to the business of insurance."

Petitioner construes these key terms to create a logical paradox that would undermine the Act. The reverse-preemption clause applies when federal and state laws both touch upon an insurance-related matter. According to petitioner, the Act applies an exacting standard when defining those state laws that

are protected from federal preemption, preserving only those state provisions that directly regulate the insurer-policyholder relationship. Petitioner contrasts this purported standard with the provision defining those federal statutes that still preempt state insurance laws. Conveniently and repeatedly omitting the word "specifically" from its quotation of § 2(b)'s reverse preemption clause, petitioner argues (Pet. Br. at 13):

The word 'relates' — which is the critical term in the second prong of the test prescribed by Section 2(b) of the McCarran-Ferguson Act — is obviously broader than the term 'regulating,' which controls the first prong of the test.

So construed, the Act would create a strong presumption in favor of federal preemption of state insurance laws. Under petitioner's construction of the reverse preemption clause, every state law that "regulate[s]" the business of insurance would be preempted by a conflicting federal law that satisfied the supposedly "obviously broader" requirement that it "relate" to insurance.

But Congress intended exactly the opposite. Petitioner's construction ignores the plain language of the Act, and would undermine the Act's policy of preserving more than a century of state insurance regulation while permitting federal preemption in limited circumstances. Petitioner's version of the McCarran-Ferguson Act would provide for broad federal preemption on insurance matters. This Court should not adopt that transformation of the McCarran-Ferguson Act.

Petitioner also urges this Court narrowly to restrict the class of state insurance regulations that have the "purpose of regulating the business of insurance" and thus are protected by the reverse preemption clause of § 2(b). In making this argument, petitioner ignores this Court's holdings that the reverse preemption clause applies to any state law that regulates, directly or indirectly, any of the many facets of the relationship between

insurers and policyholders. Petitioner offers no adequate reason for this Court to abandon its broad construction of this provision.

ARGUMENT

I. ONLY FEDERAL LAWS SPECIFICALLY ADDRESSING THE INSURANCE BUSINESS MAY PREEMPT STATE LAW

Because Congress sought to preserve state insurance regulation, the McCarran-Ferguson Act exempts only a small class of federal statutes from its reverse preemption clause: those federal laws that “specifically relate” to the business of insurance. Petitioner’s attempt to undo that careful statutory structure is based on a simple rhetorical gambit. Omitting “specifically” from most of its descriptions of the statute, petitioner urges the Court to rely on cases that broadly construe the word “relate” when it is unmodified by “specifically.” Pet. Br. at 43 (citing *Morales v. Trans World Airways*, 504 U.S. 374, 383-84 (1992) and *Smith v. United States*, 113 S. Ct. 2050, 2058 (1993)).

Based on this rewriting of the statute, petitioner announces that the class of federal statutes exempted from the reverse preemption clause is “expansive.” Pet. Br. at 45. Petitioner then reaches the remarkable conclusion that “[t]he word relates — which is the critical term in the second prong of the test prescribed by Section 2(b) of the McCarran-Ferguson Act — is obviously broader than the word ‘regulating,’ which controls the first part of the test.” Pet. Br. at 13.

But this argument would turn the McCarran-Ferguson Act on its head. If the class of federal laws that are exempt from reverse preemption is broader than the class of state laws preserved by the Act, then the reverse preemption clause has little meaning. Under petitioner’s reading of the reverse preemption clause, whenever a state statute “regulates” the business of insurance, any conflicting federal statute necessarily will “specifically relate” to the insurance business. Consequently, every

time a state regulation falls within the protection of the Act, under petitioner’s argument, a conflicting federal law nevertheless would automatically preempt the state regulation. Petitioner thereby construes the reverse preemption clause largely out of existence.

The plain language of the reverse preemption clause illustrates the error of petitioner’s argument. To reach its goal of preserving state insurance laws except when Congress specifically overrides those laws, Congress selected language to ensure that the protection for state insurance regulations is broader than the exemption for conflicting federal laws. The key to this outcome, of course, is the word in the reverse preemption clause that petitioner so repeatedly omits: “specifically.” Federal statutes are exempt from reverse preemption only if they *specifically* relate to the business of insurance.

Webster’s Collegiate Dictionary 1128 (10th ed. 1993) defines “specific” as:

- 1a. constituting or falling into a specifiable category;
- b. sharing or being those properties of something that allow it to be referred to a particular category;
- 2a. restricted to a particular individual, situation, relation, or effect . . . ; b. exerting a distinctive influence . . . ;
- 3. free from ambiguity. . .

Similarly, Black’s Law Dictionary 1398 (6th ed. 1990), defines that same word as follows:

Precisely formulated or restricted; definite; explicit; of an exact or particular nature...Having a certain form or designation; observing a certain form; particular; precise; tending to specify, or to make particular, definite, limited, or precise.

Thus, the “specifically relate” exemption is far from expansive; rather, it includes only federal laws that relate to the business of insurance in a “precisely formulated or restricted,”

“explicit” or “definite” way. *See, e.g., Lohr v. Medtronic, Inc.*, 56 F.3d 1335, 1346 (11th Cir. 1995) (“the plain meaning of the term ‘specific’ . . . [is] ‘having a real and fixed relationship to [and] restricted by nature to a particular individual, situation, relation, or effect’”) (quoting Webster’s New International Dictionary 2187 (3d ed. 1976)).

Accordingly, this Court has recognized that only federal laws explicitly intended to regulate the business of insurance are “specifically related” to the business of insurance under McCarran-Ferguson. In *Prudential*, the Court explained that the McCarran-Ferguson Act effectively establishes a presumption that federal laws do not apply to insurance matters, “except as otherwise expressly provided in the Act itself or in future legislation.” 328 U.S. at 429-30 (emphasis added). In other words, a federal law will not preempt state insurance regulation unless it “expressly provide[s]” that it does so.

United States Department of the Treasury v. Fabe, 113 S. Ct. 2202 (1993), reached the same conclusion. There, the Court stated (*id.* at 2211 (emphasis added)):

[The McCarran-Ferguson Act] transformed the legal landscape by overturning the normal rules of preemption. Ordinarily, a federal law supersedes any inconsistent state law. *The first clause of § 2(b) reverses this by imposing what is, in effect, a clear statement rule, a rule that state laws enacted ‘for the purpose of regulating the business of insurance’ do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.*¹

¹ *Amici* American Bankers Association, et al., and New York Clearing House Association urge the Court not to consider this holding in *Fabe*, dismissing it as dicta. *Amer. Bankers Ass’n Br.* at 9-10 & n. 6; *NYCHA Br.* at 10-11. But the quoted language was an integral part of *Fabe*’s central holding that the McCarran-Ferguson Act must be construed to effectuate its purpose of preserving state insurance regulation.

This “clear statement rule” acknowledges the essential nature of a reverse preemption clause such as § 2(b). If preemptive force were preserved for any federal law incidentally affecting the insurance business, then § 2(b) would become a futile and endless loop; it would classify certain state insurance regulations as appropriate for protection from federal preemption, but would then allow any conflicting federal law to preempt the state regulation anyway. Only by enforcing *Fabe*’s clear statement rule — which is squarely based on the statutory term “specifically” — can the ordinary rules of federal preemption be “reversed” as Congress intended.

Thus far, this Court has found only one federal statute, ERISA, that “specifically relates” to the business of insurance under the reverse preemption clause of § 2(b). *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 525 (1993). *Harris Trust* noted the “‘deliberately expansive’ character of ERISA’s preemption provisions . . .” 114 S. Ct. at 525 n. 8 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987)). For example, ERISA provides that it “shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C. § 1144(a). Another provision, ERISA’s “deemer clause,” provides:

Neither an employee benefit plan . . . nor any trust established under such a plan shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

29 U.S.C. § 1144(b)(2)(B).

ERISA thus meets *Fabe*’s clear statement test for the reverse preemption clause of § 2(b): Congress explicitly indicated

its intent to preempt state laws that conflict with ERISA's integrated regulation of employee benefit plans.² There is no such clear statement in 12 U.S.C. § 92. Rather, § 92 falls into the same category as statutes like the Federal Employees' Compensation Act, the Truth in Lending Act, CERCLA, RICO, and the Federal Arbitration Act. All of these statutes have been held to relate only incidentally to the business of insurance and thus, not to defeat McCarran-Ferguson's strong presumption in favor of preserving state insurance regulation.³

Whether or not § 92 might be said to relate in some fashion to the business of insurance, it surely does not *specifically* relate to that business. Indeed, the United States and the Comptroller of the Currency, writing as *amici*, admit that "Section 92 does not appear to *regulate* the business of insurance . . .," Govt. Br. at 18 (emphasis in original), adding: "We may certainly assume that in authorizing national banks in small towns to sell insurance, Congress's primary purpose was to regulate banking." *Id.* at 20. This admission should end the inquiry. A federal statute cannot indirectly "specifically relate" to the business of insurance. If a federal *banking* law like § 92 lacks any ERISA-type

² Even ERISA's clear preemptive provisions have important limits. In *New York State Conference & Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995), this Court ruled that certain state hospital cost regulations did not sufficiently "relate to" ERISA to trigger the federal act's preemption provisions.

³ See, e.g., *Cochran v. Paco, Inc.*, 606 F.2d 460, 464 (5th Cir. 1979) (Truth in Lending Act); *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606, 611 (2d Cir. 1969) (Federal Arbitration Act); *Kachanis v. United States*, 844 F. Supp. 877, 882-83 (D.R.I. 1994) (FECA); *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 827 (N.D. Cal. 1992) (RICO); *Hudson Ins. Co. v. Double D Management Co.*, 768 F. Supp. 1538, 1541-42 (M.D. Fla. 1991) (CERCLA). Strikingly, the parties in *Fabe* agreed that the federal statute granting first priority to claims of the United States against companies in liquidation — which included insurance companies — did not "specifically relate" to the business of insurance.

clear statement of exemption, it cannot preempt a state insurance regulation.

This conclusion produces a reasonable outcome in this case. In the many states which allow insurance agents to affiliate with banks, § 92 would continue to authorize insurance agency activities by national banks in towns with fewer than 5,000 persons. But if a state determines, as Florida has determined, that such an affiliation disrupts the marketing of insurance and risks injury to consumers, the reverse preemption clause of the McCarran-Ferguson Act ensures that such a determination will apply to both state and federally chartered banks in that state. The result is a consistent public policy that preserves the federalism principles that prompted the McCarran-Ferguson Act.

II. THE MCCARRAN-FERGUSON ACT PROTECTS STATE INSURANCE REGULATIONS LIKE F.S.A. § 626.988 FROM FEDERAL PREEMPTION

In order "broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," *Prudential Ins. Co.*, 328 U.S. at 429, the McCarran-Ferguson Act expansively defines the class of protected state laws as those enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Mischaracterizing the cases that have considered this phrase, petitioner offers a crabbed reading of this language: "a law 'enacted . . . for the purpose of regulating the business of insurance' must be directed toward the rights and obligations that arise from the contractual relationship between insurance companies and their policyholders." Pet. Br. at 39. Petitioner's restrictive standard is inconsistent with the statutory language and this Court's precedents.

A. The State Regulation Provision: National Securities

This Court has applied the state regulation provision of § 2(b)'s reverse preemption clause in only two cases, *SEC v.*

National Securities, Inc., 393 U.S. 453 (1969), and *Fabe*. In *National Securities*, a state law required the Arizona Director of Insurance to make a finding whether a proposed merger between state insurance companies was “[i]nequitable to the stockholders of any domestic insurer” or otherwise “contrary to law.” 393 U.S. at 457 (citing Ariz. Rev. Stat. Ann. § 20-731 (Supp. 1969)). The question presented was whether a favorable finding by that state official barred the SEC from acting against the insurance companies for misstatements in proxy materials. Finding that the Arizona statute was “attempting to regulate not the ‘insurance’ relationship, but the relationship between a stockholder and the company in which he owns stock,” 393 U.S. at 460, the Court held that the statute was not enacted for the purpose of regulating the business of insurance. *Id.* at 457.

National Securities made clear, however, that a state law need not directly regulate the “insurance relationship” in order to be protected under McCarran-Ferguson; the state statute need only be aimed at ultimately affecting that relationship (393 U.S. at 460 (emphasis added)):

The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement — these were the core of the ‘business of insurance.’ Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was — it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the ‘business of insurance.’

The critical phrase here is that federal law will not ordinarily preempt state statutes that protect or regulate the policyholder relationship, whether “directly or indirectly.”

B. The Antitrust Provision: Royal Drug and Pireno

In the years after *National Securities*, the Court twice construed the antitrust immunity provision of § 2(b). In *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), the issue was whether a drug-purchasing agreement between an insurer and certain pharmacies fell within the “business of insurance” as that phrase is used in the second clause of § 2(b). That second clause provides that federal antitrust laws apply to the business of insurance only to the extent that the business is not regulated by state law. The Court held that the pharmacy agreements were not part of the “business of insurance” because they related neither to the spreading or underwriting of risk nor to the contractual relationship between the insurer and the policyholder. 440 U.S. at 214-16.

The dissenters in *Royal Drug* objected that the Court’s test for “business of insurance” was too strict since “Congress deliberately chose to phrase the exemption broadly,” 440 U.S. at 234-35 (Brennan, J., dissenting). The Court responded that its test applied only to § 2(b)’s *antitrust* element, not to the broader reverse preemption for state regulation (*id.* at 218 n.18):

The repeated insistence in the dissenting opinion that the McCarran-Ferguson Act should be read as protecting the right of States to regulate what they traditionally regulated is thus entirely correct — and entirely irrelevant to the issue now before the Court. . . . For the question here is not whether the McCarran-Ferguson Act made state regulation of these Pharmacy Agreements exempt from attack under the Commerce Clause. It is the quite different question whether the Pharmacy Agreements are exempt from the antitrust laws.

Royal Drug's narrow construction of the "business of insurance" also relied on the principle that "exemptions from the antitrust laws are to be narrowly construed." 440 U.S. at 231. In short, because *Royal Drug* was an antitrust decision, the Court did not apply *National Securities'* broader "directly or indirectly related" standard.

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982), considered whether an insurer violated federal antitrust laws by employing a state-sanctioned peer review committee to determine appropriate reimbursement rates. *Pireno* applied a three-part test, derived from *Royal Drug*, for "business of insurance" under the antitrust clause of § 2(b):

first, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Id. at 129 (emphasis in original). As in *Royal Drug*, the *Pireno* Court formulated this test in light of its duty to construe antitrust exemptions narrowly. 458 U.S. at 126.

C. State Regulation, Again: *Fabe*

The 1993 ruling in *Fabe* confirmed that the *National Securities* analysis controls for cases under the state regulation element of § 2(b)'s reverse preemption clause, and is broader than the standard under the antitrust clause.

In *Fabe*, the Court addressed an Ohio statute that conferred a low priority on claims of the United States in proceedings to liquidate insolvent insurance companies. The federal priority statute accords first priority to such claims. The case turned on whether the Ohio statute was enacted "for the purpose of regulating the business of insurance," and thus was preserved from federal preemption by the McCarran-Ferguson Act.

Fabe noted initially that "[t]his Court has had occasion to construe this phrase only once," 113 S. Ct. at 2208, that is, in *National Securities*. In distinguishing between the reverse preemption clause and the antitrust clauses in § 2(b), the Court explained that "the first [state regulation] clause contains the word 'purpose,' a term that is significantly missing from the second [antitrust] clause." *Id.* at 2210 n. 6.

The Court then criticized the petitioner in *Fabe* for relying too heavily upon the antitrust-based standard set forth in *Royal Drug* and *Pireno* and "[m]inimizing the analysis of *National Securities*" 113 S. Ct. at 2208. "Both *Royal Drug* and *Pireno* . . . involved the scope of the antitrust immunity located in the *second* clause of § 2(b). We deal here with the *first* [state regulation] clause, which is not so narrowly circumscribed." *Id.* at 2209 (emphasis in original). The Court later elaborated:

the first clause of § 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance. The second clause accomplishes Congress' secondary goal, which was to carve out only a narrow exemption for 'the business of insurance' from the federal antitrust laws.

Id. at 2210.

The Court then applied the *National Securities* standard, which covers "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consist[ing] of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance," 113 S. Ct. at 2210 (quoting *Black's Law Dictionary* 1236, 1286 (6th ed. 1990)). The Court held that because of the broad coverage of the reverse preemption clause, the Ohio priority statute prevailed.

Fabe acknowledged that, "[t]o be sure, the Ohio statute does not directly regulate the 'business of insurance' by prescribing the terms of the insurance contract or by setting the rates charged by the insurance company." 113 S. Ct. at 2209. Nevertheless, *Fabe* held that "[b]ecause the Ohio statute is 'aimed at protecting or regulating' the performance of an insurance contract, . . . it follows that it is a law 'enacted for the purpose of regulating the business of insurance,' within the meaning of the first clause of § 2(b)." *Id.* at 2210.

D. The Purpose of § 626.988 Is to Regulate the Business of Insurance

After *Fabe*, the question in this case is whether an aim of Section 626.988 of Florida's Insurance Code is to regulate, directly or indirectly, the relationship between insurance companies and their policyholders. Even more clearly than for the state statute in *Fabe*, the answer here is yes.

Trial testimony established that the purposes of section 626.988 include: (1) preventing overreaching by financial institutions in the sale of insurance; (2) strengthening the financial stability of insurance companies, including their ability to pay their policyholders upon demand, by removing potential incentives to assume bad risks; and (3) preventing the loss of arms-length transactions and objectivity between insurer and policyholder when a bank becomes involved in the relationship. *Barnett Bank, N.A. v. Gallagher*, 43 F.3d 631, 635-36 (11th Cir.) *cert. granted*, 116 S. Ct. 39(1995).⁴ Moreover, this Court has long held the "licensing of [insurance] companies and their

⁴ See also *Glendale Fed. Sav. & Loan Ass'n v. Department of Ins.*, 587 So. 2d 534, 536 (Fla. Ct. App. 1991) (legislative purposes of § 626.988 include prevention of consumer coercion and unfair trade practices); *Production Credit Ass'n v. Department of Ins.*, 356 So.2d 31, 32 (Fla. Ct. App. 1978) ("[t]he Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest").

agents" to be within the scope of the McCarran-Ferguson Act. *National Securities*, 393 U.S. at 460 (citing *Robertson v. California*, 328 U.S. 440 (1946)).

Few matters are as fundamental to the insurer-policyholder relationship as the manner and circumstances in which the insurance policy may be sold. Indeed, the stated purpose of the Florida Insurance Code's Unfair Insurance Trade Practice Act, — of which § 926.988 is a part, is to "defin[e] . . . practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and . . . prohibit[] the trade practices so defined . . ." Fla. Stat. Ann. § 626.951. Section 622.988 certainly has the "purpose," directly or indirectly, to regulate the insurer-policyholder relationship, and thus falls within the reverse preemption clause of § 2(b).

CONCLUSION

For the reasons set forth above, the decision of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

Of Counsel:

Gary E. Hughes
Phillip E. Stano
THE AMERICAN COUNCIL
OF LIFE INSURANCE
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2120

December 8, 1995

Martin E. Lybecker
David Overlock Stewart
Counsel of Record
James M. Lichtman
ROPES & GRAY
One Franklin Square
1301 K St., N.W.
Suite 800 East
Washington, DC 20005
(202) 626-3900

Counsel for *Amicus*
The American Council
of Life Insurance

U.S. GOVERNMENT PRINTING OFFICE

Document Code: U.S.

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QUESTIONS PRESENTED

1. Whether Petitioner has produced an unambiguous showing that, in enacting 12 U.S.C. § 92 with the goal of permitting small-town national banks to generate supplemental revenues by engaging in the state regulated business of selling insurance, Congress expressed its "clear and manifest intent" to preempt traditional state law controlling the identities and activities of those licensed to sell insurance in the State?
2. Whether a state law that protects current and potential future policyholders by prohibiting licensed agents from affiliating with certain financial institutions was "enacted for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)?
3. Whether a provision of federal law buried in the Federal Reserve Act that grants some national banks charter authority to participate in the state regulated business of selling insurance, but expresses no intent to intrude upon traditional state insurance regulation, and was enacted at a time when Congress believed itself to lack constitutional authority so to intrude, "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

No. 94-1837

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

— v. —

BILL NELSON, INSURANCE COMMISSIONER OF THE STATE OF
FLORIDA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE THE COUNCIL
OF INSURANCE AGENTS AND BROKERS
IN SUPPORT OF THE RESPONDENTS

PRELIMINARY STATEMENT

The Council of Insurance Agents and Brokers respectfully submits this brief as amicus curiae in support of the Respondents, in accordance with Rule 37.3 of the Rules of the Supreme Court of the United States. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICUS CURIAE

Since almost the inception of the institution of insurance, insurance agents have been the embodiment of insurers in their dealings with policyholders and potential policyholders. In that role, insurance agents and brokers have been on the front line of insurance regulation for more than one hundred years. The modern insurance agent is characterized by a high degree of professionalism, and takes seriously the responsibility of assisting insurance purchasers obtain reliable and appropriate insurance products. At stake in this case is the continued vitality of the state regulatory schemes that have fostered and guided the development of the role of the agent during this entire period— regulatory schemes from which the petitioner and its amici, in essence, now ask this Court to exempt a class of powerful financial institutions, based upon 12 U.S.C. § 92 (1916) (“Section 92”), which extended to national banks, located in small towns with a population of five thousand or less, the ability to engage in the business of insurance as agents.

The Council of Insurance Agents and Brokers (the “Council”) is an unincorporated national trade association, founded in 1913 as the National Association of Casualty and Surety Agents. Today, the Council represents some 300 of the nation’s largest commercial property and casualty insurance agencies and brokerage firms. Council members, who operate both nationally and internationally, conduct business in more than 2,000 locations, employ more than 120,000 people, and annually place 75 percent —some \$90 billion— of commercial property and casualty insurance premiums in the United States. In addition, Council members specialize in a wide range of insurance products and risk management services for

business, industry, government, and the public. Council members also administer billions of dollars in employee benefits.

The Council is committed to promoting standards of excellence among insurance agents and brokers, and carries out that commitment through training, education, and research programs. The Council collaborates with the Wharton School of Business at the University of Pennsylvania in the development of course material on the subject of agency management. The Council sponsors workshops on financial management, commercial lines placement, and sales for its members. The Council also maintains a non-profit educational foundation, the Foundation for Agency Management Excellence, created to promote leadership and excellence in the community of agents and brokers.

The Council is also a leader in the discussion and debate, within the industry and in public fora, on issues affecting the future of insurance. It has actively participated in debates over legislative and regulatory initiatives, at the state and federal levels, affecting the institution of insurance, including debates over such issues as federal regulation, health care, environmental liability, and licensing reform. The Council has been active in this regard since its inception, and was a participant in the debates that attended the passage of the McCarran-Ferguson Act, 12 U.S.C. § 1011 et seq.

SUMMARY OF ARGUMENT

The Council respectfully submits that Section 92 cannot be properly construed to achieve the result that Congress, merely by enabling some national banks to engage in the state regulated business of insurance as agents, effectively swept away a cornerstone of the system of regulation commonly employed by the states to regulate the traditional business of private insurance, an industry the regulation of which has long been reserved to the states.

The licensure of insurance agents and brokers is central to the various state regulatory schemes for the regulation of the marketing and sale of insurance. The role of the agent or broker is a key part of the core relationship between the insurer and the insured that is regulated exclusively by the states, and licensure is the principal mechanism by which the persons or entities filling that role are regulated. When it enacted Section 92 in 1916, Congress did not believe it possessed any authority under the Constitution to regulate the business of insurance. Nor did Congress, in the language of Section 92, or in the legislative history attending its enactment, evidence any intention to displace any aspect of state regulation of the business of insurance, or to constitute national banks as a privileged class of insurance agents, free of state licensure requirements. Moreover, Congress's subsequent enactment of the McCarran-Ferguson Act should be viewed in this context as an explicit renunciation by Congress of any intent to interfere with any aspect of the state insurance regulatory scheme, including the licensure of agents and brokers.

Set against this background, Section 92 cannot be viewed as an "Act [that] specifically relates to the business of insurance" under Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). Rather, Section 92 is merely an *enabling* provision, required to grant some national banks the corporate capacity to enhance their revenues by engaging in a state regulated business unrelated to that of banking. Section 92 is not, as petitioners contend, an *empowering* statute, authorizing those national banks within its purview to sweep aside state insurance regulation, and compete unfairly with traditional insurance agents and brokers who have met, and continue to be subject to, the burdens of state licensure.

ARGUMENT

I. STATE LICENSURE PROVISIONS ARE THE CENTRAL ELEMENT OF THE REGULATION OF THE MARKETING, SALE, AND OTHER ASPECTS OF THE RELATIONSHIP BETWEEN INSURERS AND THEIR INSURED.

Laws regulating the licensing of insurance agents and brokers protect the relationship between insurers and their insured by attempting to ensure that prospective policyholders obtain reliable insurance that is adequate for their needs. Almost fifty years ago, this Court recognized, in *Robertson v. People of the State of California*, 328 U.S. 440 (1946), that insurance agent licensing laws constitute a:

series of regulations designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship.

That such dangers may exist, may even be widely prevalent in the absence of such controls, is a matter of common knowledge and experience.

Robertson, 328 U.S. at 447 (cited with approval in *SEC v. National Securities*, 393 U.S. 453, 460 (1969)).

A leading commentator on insurance law notes that licensing laws are enacted "to protect the public from surrendering its money in exchange for questionable or worthless pieces of paper denominated insurance policies." 16 JOHN J. APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 8632 (citing cases); *accord, e.g., Rizzo v. Price*, 294 A.2d 541, 543 (Conn. 1972) ("Since those purchasing insurance must rely on the advice of the agent and purchase insurance from or through him, the legislature sought to protect the public by a licensing procedure which insures that those engaged in the business are qualified."); *Wright v. Trotta*, 367 A.2d 557, 562 (Md. App. 1976) (same); *Great National Life Ins. Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex. 1964) (quoting APPLEMAN); *Waite v. Holmes*, 327 P.2d 399, 407 (Mont. 1958) (same); *State ex rel. Herbert v. Standard Oil Co.*, 35 N.E.2d 437, 440 (Ohio 1941) (same); *Black Motor Co. v. Baughman & Datron Ins. Agency*, 160 S.W.2d 388, 390 (Ky. 1942) (same).

The regulation of the business of insurance by the states has been effected in large part by the regulation of insurance agents through licensure schemes for more than a hundred years. An early administrative law treatise, which in 1927 took the state regulation of the business of insurance as its subject, noted that the distinction between the license for an insurance company and the licensing of the company's agents

was "frequently ... obscured," and went on to note that "[s]ometimes the statutes make no provision for the issuance of a license or certificate of authority to the company as distinguished from the licenses issued to the agents, and control of the company is affected by a general revocation of all of its agent's licenses." EDWIN W. PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* 157 (1927) (footnotes omitted). The treatise discussion demonstrates that at this time, roughly contemporaneous with the passage of Section 92, the power to exclude inappropriate persons or entities from becoming licensed insurance agents, or to revoke the licenses of agents who had failed to conform to appropriate standards was a key element of broad-ranging regulation of the marketing and sale of insurance products, aimed at such concerns as misrepresentation in marketing, price discrimination or rebating, and the tying of insurance products to other goods and services, including the sale of stock. *See, generally, PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES*, § 14 at 157-84.

Currently, virtually every state has some licensure provision for insurance agents. Typically, the state regulations impose education requirements upon applicants for licenses, require that applicants for the license pass an examination on insurance and insurance law, and impose continuing education requirements upon licensees. State regulatory schemes also impose significant liabilities upon agents, including civil liabilities to both insurer and insured, and civil and criminal liabilities to the state. *See, generally, BERTRAM HARNETT, RESPONSIBILITIES OF INSURANCE AGENTS AND BROKERS* §§ 5.05 to 5.06, 5.10 to 5.13 (1995); *THE NATIONAL UNDERWRITER CO., FC&S LICENSING*,

COUNTERSIGNING & SURPLUS LINES LAWS (1994) (all state survey). Licensing laws and other laws that regulate the advertising and selling of insurance policies, and the qualifications and responsibilities of insurance agents and brokers, create the context within which policyholders effect the "spreading or transfer of risk," and directly control the interface between the insurer and the insured prior to, at, and in some circumstances beyond, the point of sale.¹

The particular provision of Florida insurance law at issue here, Fla. Stat. § 626.988, contained in the Unfair Insurance Trade Practices Act of the Florida Insurance Code, is consistent with the Florida regulatory scheme as a whole. Section 626.988 prohibits insurance agents licensed in the State of Florida from being affiliated with defined classes of financial institutions, including both state and federally chartered banks and bank holding companies other than banks not affiliated with a bank holding company and located in a small town. Section 626.988 has been definitively found by the Florida courts to be a consumer protection statute that insulates policyholders and prospective policyholders from unfair coercion, "twisting" and misrepresentation, and other unfair and deceptive trade practices. *See Glendale Fed. Sav. and Loan Ass'n v. State Dep't of Ins.*, 587 So.2d 534, 535 n.1 (Fla. App. 1st Dist. 1991), *rev. denied*, 599 So.2d 656 (Fla. 1992); *Production Credit Ass'ns of Fla. v. Dep't of Ins.*, 356 So.2d 31, 32 (Fla. App. 1st Dist. 1978) ("The Legis-

¹ This Court has indicated that these are relevant to determining what constitutes the "business of insurance." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

lature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest.").

II. BECAUSE CONGRESS DID NOT BELIEVE IT COULD CONSTITUTIONALLY INTRUDE UPON THE REGULATION OF THE TRADITIONAL BUSINESS OF PRIVATE INSURANCE WHEN SECTION 92 WAS ENACTED, IT COULD NOT HAVE INTENDED THAT ENACTMENT TO PREEMPT THE LICENSURE OF AGENTS BY THE STATES.

A. Prior to the 1944 *South-Eastern Underwriter Ass'n* Decision, This Court Had Consistently Instructed Congress that It Was Without Constitutional Authority to Regulate the Traditional Business of Private Insurance.

From at least as early as this Court's decision in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 182-85 (1869), until the decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), Congress believed that it lacked any power under the Constitution to enact legislation affecting the business of insurance in any way. In *Paul*, an insurance agent subjected to a fine by the Commonwealth of Virginia for selling coverage by a New York insurer not licensed in Virginia argued in effect that the Virginia licensing requirement was a burden on interstate commerce. The argument was rejected by the Court, on the ground that contracts for insurance did not constitute commerce, and were not interstate transactions, but that the contract for insurance

was entirely a local transaction, governed wholly by local law.

The Court consistently took the same view in a line of subsequent cases, including several involving the application of state sanctions (including fines and deprivation of access to the courts to sue for premiums) for violations of insurance company or insurance agent licensing requirements. *E.g.*, *Hooper v. California*, 155 U.S. 648, 649 (1895); *Noble v. Mitchell*, 164 U.S. 367, 368-69 (1896); *Nutting v. Massachusetts*, 183 U.S. 553, 556 (1902); *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 247 U.S. 132 (1918); *Bothwell v. Buckbee, Mears Co.*, 275 U.S. 274, 275-76 (1927).

That view of the law changed with this Court's decision in *South-Eastern Underwriters Ass'n*. In that case, the Court did not expressly overrule its prior line of decisions, and did not expressly find that contracts for insurance themselves were suddenly to be deemed within Congress's power to regulate under the Commerce Clause. The Court did find, however, that Congress intended the Sherman Act to reach to the fullest extent of its power (322 U.S. at 558), and reasoned further, in light of other decisions applying the Commerce Clause power to a host of activities including some that were "non-commercial ... illegal and sporadic," that "it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation...." (322 U.S. at 549-50). Following this line of reasoning, the Court held that the Sherman Act applied to the activities of insurance companies. The Court did not attempt to address any consequences its decision might have regarding the interplay between

Congress's power under the Commerce Clause, and the traditional regulation of the insurance business by the states.

B. By Its Enactment of the McCarran-Ferguson Act, Congress Renounced Preemption of State Regulation of the Traditional Business of Private Insurance in the Absence of a Clear Statement of Contrary Congressional Intent.

The decision in *South-Eastern Underwriters Ass'n* placed the relationship between the traditional regulation of insurance by the states, and Congress's reinterpreted and expanded Commerce Clause power, into jurisdictional limbo. Congress quickly addressed this situation by enacting the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq. *See FTC v. Travelers Health Ass'n*, 362 U.S. 293, 299 (1960).

In The McCarran-Ferguson Act, Congress acquiesced in the Court's specific decision in *South-Eastern Underwriters Ass'n* regarding the reach of the federal antitrust laws, but mitigated the effect of the decision by providing that federal antitrust laws would be phased into effect in the insurance industry after a waiting period, and then only to the extent that the states had not occupied the field in the interim. 15 U.S.C. § 1012(b) (proviso). Unable to restore the status quo existing before *South-Eastern Underwriters Ass'n* short of a constitutional amendment limiting the scope of the Commerce Clause, it "transformed the legal landscape by overturning the normal rules of pre-emption." *United States Dep't of Treasury v. Fabe*, 113 S.Ct. 2202, 2211 (1993). It did so by making it clear that its silence regarding any exemption of the business of insurance from an exercise of federal power (which the Court in *South-Eastern Underwriters Ass'n* had

interpreted as a refusal to exempt (322 U.S. at 556-57)), should not in the future be so construed. 15 U.S.C. § 1011 ("silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of [the business of insurance] by the several states.") Instead, Congress provided, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance...." 15 U.S.C. § 1012(b). As this Court found in *Fabe*, Congress created a "clear-statement rule" barring preemption unless the "federal statute specifically requires otherwise." *Id.*

The form of Congress's response in The McCarran-Ferguson Act to *South-Eastern Underwriters Ass'n* leaves no doubt that Congress, prior to 1944, had not intended to, and did not believe it had, preempted or displaced any state regulation of the business of insurance. Once informed that it *had* the power to legislate regarding the business of insurance, and had exercised that power *sub silentio*, Congress acted quickly to change the interpretive framework of preemption in the area of insurance precisely so as to prevent the outcome now urged by petitioner from ever happening again.

It can fairly be concluded from Congress's corrective approach to *South-Eastern Underwriters Ass'n*, embodied in The McCarran-Ferguson Act, that Congress did not believe that it had at any time prior to that decision intended to enact any legislation that met the "specifically relates" test of 15 U.S.C. § 1012(b). Indeed, petitioner tries to head off the effect of this argument by presenting it as a *reductio ad*

absurdum derived from the reasoning of the Eleventh Circuit below. Petitioner's Brief at 46-47. But far from being absurd, this conclusion is manifestly correct; indeed, none of the arguments petitioner opposes to this conclusion withstands scrutiny.

Petitioner asserts that this conclusion "is contrary not only to [the McCarran-Ferguson Act's] plain language, but also to the clearly expressed views of its sponsors." Petitioner's Brief at 46. Presumably petitioner infers that because the Act itself contemplates retroactive application of the "specifically relates" test, there must exist legislation that meets the test. This inference is a leap unsupported by logic, however. But for the retroactive application of the "specifically relates" test, it would be possible for a court to determine with respect to other pre-McCarran-Ferguson Act enactments, as this Court did in *South-Eastern Underwriters Ass'n*, that Congress had legislated in this area *sub silentio*. But the retroactive imposition of the "specifically relates" test does no more than bar such a result; it does not imply that prior legislation exists that would *pass* the test.

Petitioner's reading of the legislative history betrays a similar lapse of logic. The specific colloquy petitioner points to does not contain an affirmation by the sponsors of the McCarran-Ferguson Act that previous legislation can be found that meets the "specifically relates" test. Indeed, the discussion between Senator Murdock and Senator Ferguson is directed at the converse conclusion. Senator Murdock is concerned with addressing the effect of the McCarran-Ferguson Act's language on previous legislation—specifically, the Sherman Act—that *fails* to meet the "specifically relates" test. He notes, given that failure, that

the provisions of Section 2(b) of the bill would permit states to "repeal," in effect, the application of the Sherman Act "insofar as it relates to the insurance business." He then proffers a technical modification to the text of the bill before the Senate, giving the antitrust provision contained in Section 4 of the bill precedence over the entire Act, that would prevent such an outcome, and Senator Ferguson accepts the amendment. Neither Senator addresses, at any point, the existence of previous legislation that might *meet* the "specifically relates" test, or characterizes that test as a "savings" clause. 91 Cong. Rec. 479 (1945). Indeed, petitioner's characterization as a "savings" clause a test which, if it had been applied by the Court in *South-Eastern Underwriters Ass'n* would have yielded a contrary result, barring application of the Sherman Act to the insurance business, borders on the wilfully perverse.

The cases discussed by petitioner on this point likewise fail to support its position. Two of those cases deal with Congress's ability to regulate federally created insurance or worker's compensation schemes, and are thus irrelevant to the issue presented here, or dealt with in the McCarran-Ferguson Act. *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *rev'd on rehearing on other grounds*, 862 F.2d 491, *cert. denied*, 490 U.S. 1035 (1988) (dealing with provisions of the Longshoremen and Harbor Workers Compensation Act); *Wissner v. Wissner*, 338 U.S. 655 (1950) (dealing with the constitutionality of the National Service Life Insurance Act of 1940 without addressing or applying the McCarran-Ferguson Act). Nothing in the doctrine developed in *Paul v. Virginia* or its progeny denies Congress the right to establish self-contained, federal insurance schemes; those

cases only established that the regulation of the existing system of insurance based on private contract was reserved exclusively to the states. The third case discussed by petitioner is even more off the point. Although in *Hanover Ins. Co. v. Commissioner*, 598 F.2d 1211 (1st Cir.), *cert. denied*, 444 U.S. 915 (1979), the First Circuit noted that a provision of the Internal Revenue Code defining "insurance company income" passed the "specifically relates" test of the McCarran-Ferguson Act, that pronouncement was plainly dictum. An alternative, and manifestly more correct ground of decision, was available in this Court's holding in *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969): the system of federal taxation at issue in *Hanover Ins. Co.*, like the federal regulation of securities at issue in *SEC v. National Securities, Inc.*, simply does not seek to regulate "the business of insurance" at all.

Once petitioner's faulty logic is corrected, it must be concluded that the "specifically relates" test, when applied retroactively, was not intended to serve as a "savings" clause, but as a hurdle set high enough to prevent another result like that reached in *South-Eastern Underwriters Ass'n*. With this function in mind, it cannot be thought plausible that Section 92, enacted without comment to give small-town national banks charter authority to engage in the state regulated business of insurance selling, could so far clear that hurdle as to sweep away one of the central features of that state regulation: the licensure of agents. This strained reading, which without the "clear statement" this Court has found must accompany federal preemption in this area after enactment of the McCarran-Ferguson Act would have far-reaching consequences on the entire system of state regulation

of the business of insurance, must yield to the far more temperate and natural reading of that provision as an enabling act, giving small-town national banks the potential— not the indefeasible right— to engage in a state regulated business wholly distinct from banking.

CONCLUSION

For the foregoing reasons, The Council of Insurance Agents and Brokers, as amicus curiae, respectfully urges that this Court affirm the decision of the Eleventh Circuit below.

Washington, D.C.

December 8, 1995

Respectfully Submitted,

Mark E. Herlihy

Levi Perry Simmons & Loots, P.C.
805 Fifteenth Street, N.W.

Washington, D.C. 20005

Tel.: (202) 325-8605

Fax: (202) 289-0184

*Counsel of Record for Amicus Curiae
The Council of Insurance Agents and
and Brokers in support of Respondents*